REPORT ON THE PREVENTION OF MISCARRIAGES OF JUSTICE

FPT HEADS OF PROSECUTIONS COMMITTEE
WORKING GROUP

FOREWORD

On behalf of the FPT Heads of Prosecutions Committee, we are pleased to submit the report of its Working Group on the Prevention of Miscarriages of Justice.

The Working Group has worked diligently for the past two years to produce this excellent report and we are indebted to its members. This report was drafted in close collaboration with the police community. This new cooperative approach will serve as a model for future joint work on issues of mutual concern.

The Heads of Prosecutions Committee has twice reviewed the report and we are pleased to inform you that jurisdictions have already begun to review their policies and practices in light of the recommendations. To supplement these efforts, as a group, the Committee has already taken concrete steps to act on several key recommendations, including the establishment of a permanent standing sub-committee on the prevention of wrongful convictions.

We also look forward to working with Manitoba and the University of Manitoba on a proposed international conference on wrongful convictions in fall 2005.

As the problem of wrongful convictions knows no borders, we have already been in touch with colleagues in the United States to share the insights and knowledge gained through the Working Group's deliberations.

As this report notes, a wrongful conviction is a failure of justice in the most fundamental sense and all participants in the criminal justice system must commit themselves to preventing such miscarriages of justice.

On behalf of the prosecution community in Canada, we commit ourselves to this important and vital challenge.

D.A. Bellemare, Q.C.
Assistant Deputy Attorney General (Criminal Law)
Federal Prosecution Service
Permanent Co-Chair of the Heads of Prosecutions Committee

Rob Finlayson
Assistant Deputy Attorney General
Manitoba Justice Prosecutions Service
Chair of the Working Group on Prevention of Miscarriages of Justice

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SUMMARY OF RECOMMENDATIONS

Tunnel Vision

The following practices should be considered to assist in deterring tunnel vision:

1. Crown policies on the role of the Crown should emphasize the quasi-judicial role of the prosecution and the danger of adopting the views and/or enthusiasm of others. Policies should also stress that Crowns should remain open to alternate theories put forward by defence counsel and other parties.

2. All jurisdictions should consider adopting a "best practice," where feasible, given geographic realities, of having a different Crown Attorney prosecute the case than the Crown Attorney who advised that there were grounds to lay the charge. Different considerations might apply with mega-cases.

3. In jurisdictions without pre-charge screening, charges should be scrutinized by Crowns as soon as practicable.

4. Second opinions and case review should be available in all areas.

5. There should be internal checks and balances through supervision by senior staff in all areas with roles and accountabilities clearly defined and a lead Crown on a particular case clearly identified.

6. Crown offices should encourage a workplace culture that does not discourage questions, consultations, and consideration of a defence perspective by Crown Attorneys.

7. Crowns and police should respect their mutual independence, while fostering cooperation and early consultation to ensure their common goal of achieving justice.

8. Regular training for Crowns and police on the dangers and prevention of tunnel vision should be implemented. Training for Crown Attorneys should include a component dealing with the role of the police, and training for police should include a component dealing with the role of the Crown.

Eyewitness Identification and Testimony

1. The following are reasonable standards and practices that should be implemented and integrated by all police agencies:

   a) If possible, an officer who is independent of the investigation should be in charge of the lineup or photospread. This officer should not know who the suspect is –

avoiding the possibility of inadvertent hints or reactions that could lead the witness before the identification takes place, or increase the witness's degree of confidence afterward.

b) The witness should be advised that the actual perpetrator may not be in the lineup or photospread, and therefore the witness should not feel that they must make an identification.

c) The suspect should not stand out in the lineup or photospread as being different from the others, based on the eyewitness' previous description of the perpetrator, or based on other factors that would draw extra attention to the suspect.

d) All of the witness's comments and statements made during the lineup or photospread viewing should be recorded verbatim, either in writing or if feasible and practical, by audio or videotaping.

e) If the identification process occurs on police premises, reasonable steps should be taken to remove the witness on completion of the lineup to prevent any potential feedback by other officers involved in the investigation and cross contamination by contact with other witnesses.

f) Show-ups should be used only in rare circumstances, such as when the suspect is apprehended near the crime scene shortly after the event.

g) A photospread should be provided sequentially, and not as a package, thus preventing 'relative judgments.'

2. For prosecutors, the following practical suggestions should be considered:

a) Assume the identity of the accused is always at issue unless the defence specifically admits it on the record. Timely preparation and a critical review of all of the available identification evidence, including the manner in which it was obtained, is required as it will affect the conduct and quality of the trial.

b) Allow the witness a reasonable opportunity to review all previously given statements and confirm that the statements were accurate and a true reflection of their observations at the time. Carefully canvass the full range of the indicia of the identification, including any distinguishing features that augment this evidence. Remember that it is the collective impact of all of the evidence that will be considered in support of a conviction. Defects in one witness's identification can be overcome by the consideration of other evidence.

c) Never interview witnesses collectively. Never prompt or coach a witness by offering clues or hints about the identity of the accused in court. Do not condone or participate in a "show-up" lineup. Never show a witness an isolated photograph or image of an accused during the interview.

d) When meeting with witnesses in serious cases, it is wise, if it is feasible and practical, to have a third party present to ensure there is no later disagreement about what took place at the meeting.

e) Never tell a witness that they are right or wrong in their identification.

f) Remember that disclosure is a continuing obligation. All inculpatory and exculpatory evidence must be disclosed to the defence in a timely fashion. In the event that a witness materially changes their original statement, by offering more or recanting previously given information during an interview, the defence must be told. In these circumstances, it would be prudent to enlist the services of a police officer to record a further statement in writing setting out these material changes.

g) Always lead evidence of the history of the identification. It is vitally important that the trier of fact not only be told of the identification but all the circumstances involved in obtaining it, i.e. the composition of photospread.

h) Be wary of prosecutions based on weak single-witness identification. While not required by law to secure a conviction, ascertain whether there is any corroboration of an eyewitness's identification in order to overcome any deficiencies in the quality of that evidence.

3. The use of expert evidence on the frailties of eyewitness identification is redundant and unnecessary in the fact-finding process. A proper charge and caution by the trial judge can best deal with the inherent dangers of identification evidence.

4. Workshops on proper interviewing techniques should be incorporated in regular and ongoing training sessions for police and prosecutors.

5. Presentations on the perils of eyewitness misidentifications should be incorporated in regular and ongoing training sessions for police and prosecutors.

False Confessions

1. Custodial interviews of a suspect at a police facility in investigations involving offences of significant personal violence (eg. murder, manslaughter, criminal negligence causing death or bodily harm, aggravated assault, aggravated sexual assault, sexual assault of a child, armed robbery, etc.) should be video recorded. The video recording should not be confined to a final statement made by the suspect, but should include the entire interview.

2. Investigation standards should be reviewed to ensure that they include standards for the interviewing of suspects (and witnesses) that are designed to enhance the reliability of the product of the interview process and to accurately preserve the contents of the interview.

3. Police investigators and Crown prosecutors should receive training about the existence, causes and psychology of police-induced confessions, including why some people confess to crimes they have not committed, and the proper techniques for the interviewing of suspects (and witnesses) that are designed to enhance the reliability of the product of the interview process.

In-Custody Informers

1. Cross-sectoral educational programming should be provided to ensure that justice professionals are aware of:

    a) the dangers associated with in-custody informer information and evidence;
    b) the factors affecting in-custody informer reliability;
    c) policies and procedures that must be employed to avoid the risk of wrongful convictions precipitated by in-custody informer information or evidence.

2. Policy guidelines should be developed to assist, support and limit the use of in-custody informer information and evidence by police and prosecutors.

3. Each province should establish an in-custody informer registry so that police, prosecutors and defence counsel have access to information concerning prior testimonial involvement of in-custody informers. The creation of a national in-custody informer registry should be considered as a long-term objective.

4. A committee of senior prosecutors unconnected with the case should review every proposed use of an in-custody informer. The in-custody informer should not be relied upon except where there is a compelling public interest in doing so. The In-Custody Informer Committee's assessment should take into account, among other things, factors affecting the reliability of the information or evidence proffered by the informer. That reliability assessment should, moreover, begin from the premise that informers are, by definition, unreliable. Any relevant material change in circumstances should be brought to the In-Custody Informer Committee's attention to determine whether the initial

decision as to whether there was a compelling public interest in relying on the in-custody informer should be revisited.

5. Any agreements made with in-custody informers relating to consideration in exchange for information or evidence should, absent exceptional circumstances, be reduced to writing and signed by a prosecutor (in consultation with the relevant police service/investigative agency), the informer, and his or her counsel (if represented). A fully recorded oral agreement may substitute for a written agreement.

6. In-custody informers who give false evidence should be vigorously and diligently prosecuted in order to, among other things, deter like-minded members of the prison population.

DNA Evidence

1. Strong policies and procedures for Crown counsel should be implemented in all jurisdictions to ensure that the DNA data bank provisions are being used to their full potential.

2. Provincial tracking systems should be developed to better understand the use and effectiveness of DNA in the criminal justice system, with the ultimate goal of establishing a national tracking system.

3. The significance of the national DNA data bank to both convicting the guilty and preventing the conviction of the innocent should be included in any educational programs for Crowns and police and should be considered for inclusion in the National Judicial Institute curriculum for judges. A research package for Crowns on DNA data bank applications and the use of DNA evidence should be developed and kept current.

4. Protocols and procedures should be developed by law enforcement agencies and justice departments to facilitate the release of forensic materials for independent testing upon the request of the defence.

5. The expansion of the DNA data bank should be considered. Any expansion of the list of primary and secondary designated offences (offences that are eligible for DNA data bank orders) must take into account important *Charter* protections to ensure that individual rights and freedoms are respected in the collection and use of DNA information.

6. The issue of access to post-conviction DNA testing should be studied.

Forensic Evidence and Expert Testimony

1. Prosecutors should receive training on the proper use, examination and cross-examination of expert witnesses during ongoing and regular education sessions.

2. The Heads of Prosecutions Committee should consider the feasibility of establishing a national central repository to catalog and track among others:

- case law,
- newsletters and articles,
- reliability of current techniques,
- the latest developments and advancements in specific fields of expertise,
- sources of literature and study guides,
- directories of professional organizations from across the country (including criteria for the qualifications of specific experts),
- prosecution policies,
- teaching aids

This applies to all Web-based models permitting online access to the data and regular updating of information to maintain currency.

3. Prosecutors should not shy away from the use and reliance on novel scientific technique or theory in the appropriate situation providing there is a sufficient foundation to establish the reliability and necessity of these opinions and that the probative value does not exceed the potential prejudicial effects.

4. Prosecutors should be reminded of the existence of Section 657.3 of the *Criminal Code* and the requirements and reciprocal obligations of disclosure imposed on all parties to a proceeding intending to tender expert evidence at trial.

Education

1. A National Forum on the Prevention of Wrongful Convictions, co-sponsored by the Heads of Prosecutions Committee and the Canadian Association of Chiefs of Police, should be held to provide national leadership and direction.[*]

2. The following options for educational venues should be considered :

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[*] Subsequent to the writing of this report, the Manitoba government, in conjunction with the University of Manitoba, has begun to plan an international conference on wrongful convictions in Winnipeg in October 2005. A representative of the Working Group is on the organizing committee and the Working Group believes this conference can achieve the same objectives as the proposed National Forum and wholeheartedly supports the initiative.

a) joint educational sessions involving Crowns, police, defence and forensic scientists;
b) specialized conferences, courses and educational materials for police;
c) specialized conferences for Crowns, as well as segments in continuing education programs;
d) judicial information sessions;
e) law school courses;
f) bar admission course; and
g) education opportunities for the defence bar.

3. The following educational techniques should be considered:

a) presentation of case studies of wrongful convictions and lessons learned;
b) small group discussions and role-playing, demonstrations of witness interviews, and conducting photo-lineups;
c) on-line training for Crowns and police;
d) distribution of educational materials/policies on CD-ROM;
e) video-linked conferences;
f) participation of psychologists, law professors and criminologists in educational conferences;
g) guest speakers, including the wrongfully convicted; and
h) regular newsletters on miscarriage of justice issues.

4. The following educational topics should be considered:

a) role of the Crown and Attorney General;
b) role of the police;
c) tunnel vision;
d) post-offence conduct and demeanour evidence;
e) frailties of eyewitness identification;
f) false confessions;
g) witness interviews;
h) alibi evidence;
i) jailhouse informants;
j) ineffective assistance of defence counsel;
k) forensic scientific evidence and the proper use of expert evidence;
l) benefits of DNA evidence;
m) disclosure;
n) charge screening;
o) conceding appeals/fresh evidence.

5. Each prosecution service should develop a comprehensive written plan for educating its Crown attorneys on the causes and prevention of wrongful convictions.

6. Any educational plan for the prevention of miscarriages of justice should include a public communication strategy to advise the public that participants in the criminal justice system are willing to take action to prevent future wrongful convictions.

Police Notebooks/Crown Files/Trial Exhibits

Clear policies should be developed for police, Crowns and court services on how long to keep police notebooks, Crown files and trial exhibits. Clearly the cost implications will have to be considered in developing such policies.

Ineffective Assistance of Counsel

An issue that deserves some attention is what are the responsibilities of Crown counsel when they suspect an accused person may not be getting effective counsel. Perhaps some guidelines should be developed to assist prosecutors in these difficult ethical situations.

Conclusion

1. Subject to available resources, the Heads of Prosecutions Committee, perhaps in association with the Canadian Association of Chiefs of Police, should establish a resource center on the prevention of wrongful convictions. This could be a Web page or a page on the revamped HOP Intranet site.

2. HOP should establish a permanent committee on the prevention of wrongful convictions, with continued involvement of the police community through the CACP.

3. The recommendations in this report should be continually reviewed by the committee to take into account developments in the law and technology and subsequent commissions of inquiry. At a minimum, a full review should take place in five years building on the ongoing work of this committee.

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THE PREVENTION OF
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CHAPTER 1 - INTRODUCTION

A wrongful conviction is a failure of justice in the most fundamental sense. An innocent person has been erroneously convicted of a crime that he or she did not commit. In many instances, this has resulted in long and difficult years of incarceration. This is most disturbing in the face of Canada's strong and robust system of checks and balances in the criminal justice system, which includes the *Canadian Charter of Rights and Freedoms*, the tradition of the Crown as an independent quasi-judicial officer and the police community as fair and impartial investigators.

No matter how many cases are successfully prosecuted every day in our courtrooms, wrongful convictions, regardless of how infrequent, are a reminder of the fallibility of the justice system and a stain on its well-deserved positive reputation.

Public confidence in the administration of justice is fostered by demonstrating that participants in the criminal justice system are willing to take action to prevent future miscarriages of justice. It is also important to foster public understanding that fair, independent and impartial police investigations and Crown prosecutions are in the public interest.

Various commissions and studies, in Canada and around the world, have provided valuable insight into the systemic causes of wrongful convictions and into what has gone wrong in individual cases. What is startling, however, is that some problems, themes and mistakes arise time and time again, regardless of where the miscarriage of justice took place. These problems relate to the conduct of police, Crowns, defence lawyers, judges and forensic scientists, and they are not confined to proceedings in the courtroom.

When a miscarriage of justice occurs, it is not usually the result of just one mistake, but rather a combination of events. Therefore, just as the problems and errors are multi-layered, so too must the solutions also be multi-faceted. The responsibility to prevent wrongful convictions, therefore, falls on all participants in the criminal justice system. Police officers, Crown counsel, forensic scientists, judges and defence counsel all have a role to play in ensuring that innocent people are not convicted of crimes they didn't commit. Furthermore, this is an issue that does not touch on one single province or jurisdiction alone. As useful as commissions of inquiry may be, they usually come many years after the fact – the goal of all justice system participants must be to prevents wrongful convictions from occurring in the first place.

In the fall of 2002, in response to a number of wrongful convictions across the country and the various reports of inquiries they generated, the FPT Heads of Prosecutions Committee established a Working Group on the Prevention of Miscarriages of Justice. The group's mandate is two-fold:

- It will develop a list of best practices to assist prosecutors and police in better understanding the causes of wrongful convictions;
- It will recommend proactive policies, protocols and educational processes to guard against future miscarriages of justice.

The Working Group included prosecutors with many years of experience, both trial and appellate. It was chaired by Rob Finlayson, Assistant Deputy Attorney General, Manitoba. Other participants included: Mary Nethery, Joanna Pearson, Miriam Bloomenfeld (Ontario); Tom Mills (Newfoundland and Labrador); Richard Taylor (Alberta); Zane Tessler (Manitoba); and Stephen Bindman (Canada). Brian Kaplan (Manitoba) and Michael Callaghan (Ontario) also contributed to the work.

The Group also benefited from extensive participation in its work by representatives of the Canadian Association of Chiefs of Police (CACP): Bill Lenton (RCMP Ottawa), Jean-Michel Blais (RCMP Manitoba), Murray Stooke (Calgary Police Service) and Frank Ryder (Ontario Provincial Police). This reflected the Working Group's strongly held view that only a joint effort by all players in the justice system – police, prosecutors, the judiciary, and defence bar – can effectively reduce the risk of wrongful convictions. The Working Group also held a meeting with the Law Amendments Committee of CACP to review the draft recommendations and CACP later surveyed its members to obtain information on some current police practices. The Working Group is extremely grateful for the input and support provided by CACP.

The Working Group was also asked to review and comment on the excellent paper *Convicting the Innocent – A triple failure of the justice system*, prepared by Bruce A. MacFarlane, Q.C., Deputy Attorney General of Manitoba, and presented at the Heads of Prosecutions Agencies in the Commonwealth Conference at Darwin, Australia on May 7, 2003.[1] The paper thoroughly canvasses the literature on the subject of wrongful convictions and reviews the various common causes that have been identified. Each chapter in this report contains a discussion of the recommendations made by Mr. MacFarlane.

The Working Group's recommendations are aimed primarily at the most serious of offences, particularly homicides. These are the cases where the risk of long-term incarceration, and hence the consequences of a wrongful conviction, are the greatest. However, we recognize that some of our suggestions are applicable to other offences as well, when feasible.

Our report focuses on the issues that have been identified time and time again, both in Canada and elsewhere, as the key factors that contribute to wrongful convictions:

- tunnel vision
- mistaken eyewitness identification and testimony
- false confessions
- in-custody informers
- DNA evidence
- forensic evidence and expert testimony
- education

Our report, however, should not be viewed as a beginning or a starting point, but as another stop along a well-established road. As will be obvious, our recommendations build on the extensive work already being done in several Canadian jurisdictions, especially those that have had a commission of inquiry examine one of their prosecutions, which has resulted in a wrongful conviction. We have reproduced many of the excellent policies that have resulted from this work.

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[1] Available at www.canadiancriminallaw.com

The risk of error always exists in any human endeavor. In the justice system, the consequences of a wrongful conviction can be tragic. The Working Group hopes its recommendations, if implemented, will go a long way towards reducing the risk of future wrongful convictions and ensuring that the innocent are acquitted and the guilty convicted.

CHAPTER 2 - INTERNATIONAL REVIEW

Over the past century, a significant number of studies on wrongful convictions and their causes have been undertaken. These studies were carried out in a wide variety of circumstances, with differing driving forces behind them. Some were privately commissioned; others were mandated by government. Some focused on a single case; others examined a group of unconnected cases. Many were done by scholars employed in universities, although a number were prepared by sitting or retired members of the judiciary.

These studies were also carried out in distinctly diverse legal, political and social environments in Canada, the United States, Britain, Australia and New Zealand. Therefore, some caution must be exercised before automatically assuming their conclusions are applicable to Canada. In the United States, for example, there is the overlay of the death penalty and the issue of race that is not present in Canada. As well, many American prosecutors are elected and there is not the same legal aid system as in Canada to ensure adequate representation of those facing the most serious of charges.

Still, as Bruce MacFarlane notes, despite the diversity of the studies, the patterns and trends that emerge from them are "both chilling and disconcerting." He also concludes that despite a slow start in the recognition that a problem even exists, Anglo-based criminal justice systems, confronted with the power of scientific developments such as DNA, are now having to grapple with the stark *reality*, and not merely a *belief*, that wrongful convictions have occurred on a significant scale.

The following is an edited version of MacFarlane's review of the international literature on wrongful convictions.

a) American Prison Congress Review (1912)

The earliest attempt to identify cases in which innocent persons were executed was conducted in 1912 by the American Prison Congress.[2] The mandate of the Congress was to "carefully investigate every reported case of unjust conviction and try to discover if the death penalty has ever been inflicted upon an unjust man."[3] After a year of review, it concluded that no such cases existed.

To describe this review as a "study" is a bit charitable; and it was certainly not analytical in nature. The methodology simply involved sending a letter of enquiry to the warden in each prison in Canada and the United States, asking whether he had personal knowledge of any wrongful executions. The Congress did not report the response rate, but all responses received were in the negative.[4] The sole exception was the response from the warden at Fort

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[2] R.H. Gault, *Find No Unjust Hangings*, *3 J. Am. Inst. Crim. L. and Criminology* 131 (1912-13).

[3] *Ibid.* at page 131.

[4] *Ibid.*

Leavenworth, Kansas. He advised that "one or two (persons)…may, in my opinion, have been executed wrongfully."[5]

This review lent support to the prevailing view at that time: miscarriages of justice rarely occur (at least in cases involving the death penalty). Where they do occur, they are remedied through normal judicial or executive procedures before the execution actually takes place.[6]

b) U.S. State Department Document (1912)

In 1912, Edwin M. Borchard, then a young Law Librarian of Congress, wrote an article entitled "*State Indemnity for Errors of Criminal Justice*." Accompanied by an editorial preface by John H. Wigmore, then Dean of the Northwestern University School of Law, Borchard's article was published by the United States Government and forms a permanent Senate document in the United States.[7]

In his introductory editorial, Wigmore asserts: [8]

> The State is apt to be indifferent and heartless when its own wrongdoings and blunders are to be redressed. The reason lies partly in the difficulties of providing proper machinery and partly in the principle that individual sacrifices must often be borne for the public good. Nevertheless, one glaring instance of such heartlessness, not excusable on any grounds, is the State's failure to make compensation to those who have been erroneously condemned for crime.

Having subjected the citizen to meritless allegations, Wigmore felt that the State should at least try to compensate for the wrong done:[9]

> To deprive a man of liberty, put him to heavy expense in defending himself and to cut off his power to earn a living, perhaps also to exact a money fine – these are sacrifices which the State imposes on him for the public purpose of punishing crime. And when it is found that he incurred these sacrifices through no demerit of his

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[5] *Ibid.*

[6] Carolyn Strange, *Comment: "Capital Case Procedure Manual"*, (1999), 41 C.L.Q. 184.

[7] *State Indemnity for Errors of Criminal Justice*, by Edwin M. Borchard, Law Librarian of Congress, with an editorial preface by John H. Wigmore, Dean, Northwestern University School of Law, to accompany the Bill (Section 7675) to grant relief to persons erroneously convicted in courts of the United States, (Washington: Government Printing Office, 1912).

[8] *Ibid.* at page 8.

[9] *Ibid.*

> own, that he was innocent, then should not the State at least compensate him, so far as money can do so?

Borchard's commentary followed Wigmore's impassioned plea. It was fueled by the case of Andrew Toth, who had recently been convicted of murder in Pennsylvania and sentenced to life imprisonment. After having served 20 years in jail, he was found innocent of the crime. There was no law at the time providing for compensation; however, philanthropist Andrew Carnegie pensioned him at $40 per month. In contrast, Adolph Beck, who had been exonerated of a crime for which he had spent seven years in prison, had been granted an *ex gratia* payment of five thousand pounds by the British Parliament.[10] On this state of affairs, Borchard said: [11]

> In an age when social justice is the watchword of legislative reform, it is strange that society, at least in this country, utterly disregards the plight of the innocent victim of unjust conviction or detention in criminal cases. No attempt whatever seems to have been made in the United States to indemnify these unfortunate victims of mistakes in the administration of the criminal law, although cases of shocking injustice are of not infrequent occurrence.

In his article, Borchard described in considerable detail the enabling statutes throughout Europe, the practice that had developed, as well as the theoretical framework underlying compensation to those who had been wrongfully convicted. He concluded that while the principle had been clearly recognized, remedies were, in practice, only granted within the narrowest limits of the law. He added: "...the procedure is generally very complicated; in fact so complicated that it is hard to understand how the poor acquitted individual thrown out in the world can ever find the means to prosecute his claim." [12]

c) Borchard Study (1932)

The first systematic research on miscarriages of justice was done by Borchard some 20 years later as a professor of law at Yale University. His classic 1932 work *Convicting the Innocent*[13] identified a total of 65 American and British cases in which innocent defendants had been convicted of felonies - 29 for murder, 23 for robbery and like offences, and 13 for lesser offences such as forgery, assault, attempted bribery and prostitution.

Geographically, his study cut across 26 different states, as well as the District of Columbia and England. In the cases chosen for inclusion, innocence was established in several ways: where the allegedly murdered person turned up alive; by the subsequent conviction of the real culprit; or by the discovery of new evidence which demonstrated, through a new trial, or to the satisfaction of a state governor or the president of the United States, that the wrong person had been convicted.[14]

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[10] Eric R. Watson, *Adolf Beck* (Toronto: Canada Law Book Company, Ltd.). The Beck case ultimately led to the establishment of a Court of Criminal Appeal in the United Kingdom.

[11] Borchard, *supra.*, at page 5.

[12] *Ibid.* page 20.

[13] Garden City Publishing Company: Garden City, New York, 1932.

Borchard found the principal causes of wrongful conviction were: mistaken identification; circumstantial evidence leading to erroneous inferences; perjury; or some combination of these factors.

More importantly, Borchard also described several *environmental* factors that allowed wrongful convictions to occur. The first involved public pressure to solve horrific crimes:[15]

> ...it is common knowledge that the prosecuting technique in the United States is to regard a conviction as a personal victory calculated to enhance the prestige of the prosecutor. Except in the few cases where evidence is consciously suppressed or manufactured, bad faith is not necessarily attributable to the police or prosecution; it is the environment in which they live, with an undiscriminating public clamor for them to stamp out crime and make short shrift of suspects, which often serves to induce them to pin a crime upon a person accused.

Borchard framed the issue in these terms:[16]

> Public opinion is often as much to blame as the prosecutor or other circumstances for miscarriages of justice. Criminal trials take place under conditions with respect to which public interest and passions are easily aroused. In fourteen of the cases in this collection in which the frightful mistake committed might have been avoidable, public opinion was excited by the crime and moved by revenge to demand its sacrifice, a demand to which prosecutors and juries are not impervious. This can by no means be deemed an argument for the abolition of the jury, for judges alone might be equally susceptible to community opinion. But it is a fact not to be overlooked.

Borchard concluded that two further environmental factors tend to foster wrongful convictions. The first was evidence in court of a previous criminal conviction, which he said was "often fatal to an accused person."[17] Second, Borchard concluded that the decision by an accused to exercise his right to remain silent often left a sour taste in the mouth of a jury:[18]

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[14] *Ibid.* at page vi.

[15] *Ibid.* at page 369.

[16] *Ibid.* at page 372.

> Refusal to take the stand – under circumstances where an explanation from the accused is naturally expected – even if it cannot be commented upon by judge or prosecutor, inevitably affects the jury unfavorably; but in addition, the accused's known privilege of refusing to testify influences the police to exact "confessions" which, whether true or not, stigmatize the system of obtaining them as a public disgrace.

Borchard's work is important for several reasons. He was the first to approach the subject in a systematic, analytical way. His conclusion that eyewitness misidentification is the primary reason for wrongful conviction has been confirmed in virtually every study since then. But there is one thing that he left as an enduring legacy: the notion that "circumstances" or "environmental factors" can serve to foster a wrongful conviction. There can be no doubt that certain environmental factors can serve to nurture a wrongful conviction.

d) Franks' Study (1957)

Twenty-five years passed before any further analytical studies of significance emerged. In 1957, Jerome Frank, a judge of the U.S. Circuit Court of Appeals, published a book entitled *Not Guilty*, in collaboration with his daughter Barbara Frank and Harold M. Hoffman, a lawyer from New York.[19] The book traces 36 cases of wrongful conviction, and points to several systemic causes: mistaken testimony, especially by eyewitnesses; defective understanding of the evidence by jurors; an adversarial process that allows a fight mentality to emphasize strategies and success rather than the discovery of the truth; and a meager disclosure process that stacks the cards against the defendant from the outset.

The Franks spent considerably more time than Borchard analyzing the underlying *causes* of wrongful conviction. They were struck by the human nature of the process, noting that the weaknesses of those involved can, in many cases, affect the outcome.

Judge Frank argued that when an honest witness testifies to a fact, he represents three things under oath: that he accurately *saw* the event; that now, in the courtroom, he accurately *remembers* what he encountered; and that he is now accurately *reporting* his memory. Into each of these three elements, Judge Frank contended, error can enter, leading to mistaken testimony.[20]

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[17] *Ibid.* at page 369-70.

[18] *Ibid.* at page 371.

[19] *Not Guilty*, by Judge Jerome Frank and Barbara Frank, in association with Harold M. Hoffman (Doubleday and Company, Inc., Garden City, New York, 1957.) Jerome Frank died following the last changes to the manuscript and Barbara Frank pursued publication with an endorsing foreword by William O. Douglas, a justice of the Supreme Court of the United States.

[20] *Ibid.*, at page 200.

Quoting judicial and psychological authority of the day, Judge Frank added: "The great body of honest testimony is subjectively accurate but objectively false…observation is a complex affair; it is mingled with inferences, judgments (and) interpretations."[21]

"What is lost from memory," Judge Frank concluded, "is often replaced by products of the imagination," sometimes referred to as "creative forgettery" or "imaginative memory." This psychological phenomenon allows a witness to retouch the details, and unconsciously fill in memory gaps. Powerfully, Judge Frank argued that "witnesses who are perfectly honest are in danger of turning inferences into recollections."[22]

The unconscious prejudice of otherwise honest witnesses may influence memory subtly yet significantly. Judge Frank gave an illustration:[23]

> Other kinds of unconscious prejudice may perniciously influence memory: You see a fight between the police and union pickets. Your original impression was confused. If you are an ardent union sympathizer, you may later remember with clarity that the police brutally assaulted the pickets. "Honest" bias... may "be the deciding factor in filling in the gaps of memory."

His own analysis, psychological views at the time, as well as judicial conclusions throughout the United States in a wide variety of cases, led Judge Frank to view uncorroborated testimony with great caution:[24]

> The courts, then, agree with the psychologists about the treachery of memory. They agree that memory is the weakest element in testimony; that, because of the numerous unknown factors that affect it, a witness' memory is often not trustworthy as a proof of any fact in a trial.

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[21] *Ibid.* at page 202.

[22] *Ibid.* at page 210; to the same effect, see *R v Miaponoose* (1996), 110 C.C.C. (3d) 445 (Ont. C.A.), in which the Court, at page 451, noted literature which suggests that witnesses are inclined to fill in perceived events with other details: "They will relate their testimony in good faith, and as honestly as possible, without realizing the extent to which it has been distorted by their cognitive interpretive processes."

[23] Frank, *supra.*, at page 213.

[24] *Ibid.* at page 212.

e) Du Cann Study (1960)

In 1960, C.G.L. Du Cann, a British barrister, published the book *Miscarriages of Justice*.[25] Intended for the general reader as well as members of the legal profession, his book was revolutionary and quite flamboyant. As he put it in the preface: "Here is this book: A sacrilegious and blasphemous brawler in that holy of holies, the Temple of Justice."[26] Still, the book is regularly cited.

Using nine English cases of actual or apparent wrongful convictions as a basis for his comments, Du Cann advocated fundamental changes to criminal law, procedure and the rules of evidence. English criminal law, he said, was both uncertain and overly rigid. On the issue of common law precedents, Du Cann bluntly argued that "the dead hand rules us."[27] He advocated the enactment of a criminal code that would provide a principled approach that was measured in application, and certain in response.

Du Cann argued forcibly that our criminal procedure needs a "roots and branch" reform, not just pruning: [28]

> What seems harmless and picturesque in our courts to the unreflecting mind is harmful indeed by giving the falsity and a sense of unreality to the truth and justice for the sake of which alone the courts exist. Theatrical costume, tawdry play-acting, lying rhetoric, bombastic and blasphemous oaths should go. The form of trial might well be rather inquisitorial than accusatorial and real expression given to the idea that the accused is innocent until the court has convicted him.

Traditional rules of evidence came under particularly vicious attack. He said:[29]

> Suppression of truth in courts professing to seek "the truth, the whole truth and nothing but the truth" should not be tolerated even in the fancied or real interest of the prisoner. For instance, modern juries under careful judicial directions are sufficiently educated and sophisticated to understand that a man may be an habitual thief and yet have not committed the present theft alleged, and to be on their guard against prejudice arising from this.

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[25] Frederick Muller Limited, London, 1960.

[26] *Ibid.* at page 6.

[27] *Ibid.* at page 266.

[28] *Ibid.* at page 267.

[29] *Ibid.* at page 268.

Challenging conventional practices such as the single-judge system of criminal justice, evidence taken under an oath, reliance on the adversarial rather than the inquisitorial system, Du Cann summarized his principal thesis in the following passage:[30]

> And the moral is that miscarriages of justice may well take place in the courts as they are today. The deliberately cultivated atmosphere of pretense and unreality and theatricality by costume and speech does not encourage truth. Nor does the outmoded oath and the tolerance of perjury. A trial procedure exists which does not seek truth so much as the hunting down of the quarry – which is accusatory rather than inquisitory, and to which cling out-moded unfairnesses between prosecution and defence, as well as unequal advocacy which may tip the scales of justice to the wrong side, the rules of which remain unfair as between prosecution and defence in some important respects; substantive law very often uncertain and unintelligible or unnecessarily complex and confusing; the triumph of mere precedence over right reason and the unrealities of the past over the present; the sentence gamble dependent upon single-judge idiosyncrasy; and the obstinate refusal to modernise court machinery: – these are a few of the characteristics of our British methods which may be confidently expected to militate against justice.

f) Radin Study (1964)

Crime analyst Edward Radin published *The Innocents*[31] in 1964. Focusing on 80 new cases of wrongful conviction, Radin's conclusions about the causes of wrongful conviction echoed those of his predecessors: police-coerced confessions; single eyewitness misidentification; inadequate disclosure by the prosecution; and inadequate resources to defend difficult cases.

He raised two further points that had received only scant attention before but are critical factors for consideration.

First, Radin deplored the "game theory" of criminal cases, under which the prosecutor "view(s) a trial as a kind of game…they are so busy planning how to outwit, outsmart and outmaneuver an opponent that they forget that justice is the sole purpose of the criminal trial."[32]

Second, Radin urged the legal profession to closely examine the circumstances surrounding a wrongful conviction, to learn what occurred and to take steps to prevent future occurrences. The conviction of an innocent person should, he argued, "ring an alarm bell" within the broad legal community.[33]

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[30] *Ibid.* at pages 177-8.

[31] Edward D. Radin, *The Innocents* (New York: William Mauro and Company, 1964).

[32] *Ibid.* at page 35.

g) Brandon and Davies Study (1973)

Class distinctions emerged as a critical factor in a British study published in 1973 by Ruth Brandon and Christie Davies.[34] Discussing the *profile* of the person most commonly imprisoned wrongly, the authors said: [35]

> On the whole, they seemed to be a normal cross-section of the people who normally get sent to jail. Most of them have previous records of committing the kind of crime of which, this time, they were wrongfully convicted. Most of them did unskilled work. Many were unemployed or only did casual jobs. Very few were drawn from the middle class or from the respectable working class.

Building on the work done by Borchard, Judge Frank and Du Cann, Brandon and Davies reviewed 70 cases of acknowledged wrongful imprisonment[36] and concluded that recurring themes were emerging in Anglo-based criminal justice systems:[37]

> Patterns which emerged frequently in both groups as causes of imprisonment were: unsatisfactory identification, particularly by confrontation between the accused and the witness; confessions made by the feeble-minded and the inadequate; evidence favorable to the defence withheld by the prosecution; certain joint trials; perjury, especially in cases involving sexual or quasi-sexual offences; badly conducted defence; criminals as witnesses.

Reform proposals put forward by the authors were, at the same time, progressive and heretical in nature: the prosecution "should be required to disclose any evidence it may possess which is favourable to the defence, *whether or not it is proposing to use it during the trial.*"[38] More radically, however, the authors contended that the defence should be required to give some details concerning the case it intended to present, well beyond its present common law obligation to disclose alibi evidence.[39]

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[33] *Ibid.* at page 230.

[34] Ruth Brandon and Christie Davies, *Wrongful Imprisonment* (London: George Allen and Unwin Ltd, 1973).

[35] *Ibid.*, page 22.

[36] *Ibid.*, page 19: Those granted pardons or those whose convictions were overturned by the Court of Appeal.

[37] *Ibid.* at page 21.

[38] *Ibid.* at page 255.

[39] *Ibid.* at page 256.

h) The 1980s: Royal Commissions in Australia and New Zealand

It is apparent that the analyses of wrongful convictions until the 1970s were, for the most part, undertaken by concerned *individuals*. Some of these analyses were scholarly in nature; others were not, and seem a bit sensational – perhaps intended for a mass audience rather than as an instrument of reform. The prevailing public view, however, continued to be: Yes, there are occasional errors, but they are simply aberrations in an otherwise strong and flawless legal system.

As the 1980s approached, the landscape shifted in two ways. First, it became abundantly clear that wrongful convictions were occurring in virtually all Anglo-based criminal justice systems. Second, serious questions were being raised about whether some not-so-subtle *systemic* practices were contributing significantly to the problem.

In Australia, the Chamberlain Case[40] (sometimes known as the Dingo Baby Case) gripped the nation for two decades.[41]

Alice Lynne Chamberlain was convicted in 1982 of the murder of her nine-week old daughter, Azaria. Her husband, Michael Leigh Chamberlain, was convicted of being an accessory after the fact. The Crown's case lacked any evidence of motive or confession, and neither a murder weapon nor the body of the child was found. Mrs. Chamberlain contended that a dingo (a wild dog) had run off with the child. After she spent three and a half years in prison, a Royal Commission into the case concluded "that there are serious doubts and questions as to the Chamberlains' guilt and as to the evidence in the trial leading to their convictions."[42] The Commissioner concluded that there was absolutely no evidence of human involvement in the child's disappearance and evident death.

Shortly afterward, the Northern Territorial Government pardoned Mrs. Chamberlain and her husband. They were awarded over $1 million in compensation. Scientific evidence, in particular blood examinations, which had been critical to the Crown's case at trial, had been fully discredited during the Royal Commission. As well, it was concluded that a key forensic witness had taken on the role as a protagonist rather than a "dispassionate provider of scientific information."[43]

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[40] *Chamberlain v the Queen* (No. 2) (1984) 153 C.L.R. 521 (H.C.).

[41] Most recently, see "Witch Hunt" by Paul Toohey in *The Australian* (July 15, 2000): www.theaustralian.com.au/extras/toohey/s1s1.html and "Scientist in Dingo Case at Heart of Ambush Inquiry," by Patrick Barkham, in Sydney, published in *The Guardian* (UK) on February 25, 2002: www.guardian.co.uk/uk_news/story/0,3604,656540,00.html .The leading book on the case was written by John Bryson, an author and trial lawyer: *Evil Angels* (New York: Summit Books, 1985).

[42] *Australia Royal Commission of Inquiry into Chamberlain Convictions* in 1987 (Honorable T.R. Morling, Commissioner), at page 342, further considered by the courts in the light of the findings of this Royal Commission in: *Reference under section 433A of the Criminal Code of the Attorney General for the Northern Territory of Australia of convictions of Alice Lynne Chamberlain and Michael Leigh Chamberlain*, [1988] N.T.S.C. 64.

In the wake of the Royal Commission Report, Judy Bourke argued in the *Australian Bar Review* that scientific evidence is frequently misused in criminal trials because it often is unreliable, yet shielded from scrutiny by an ever-present aura of scientific certainty.[44] In the end, it was clear in the Chamberlain case that questionable police conduct, coupled with unreliable forensic evidence, had been woven together to support a mistaken prosecution theory that a tragic death was actually a murder.

Scientific evidence which the Crown had successfully relied on in securing convictions was subsequently found unreliable in a number of other Australian prosecutions during the 1980s. In the case of Edward Charles Splatt (*The Shannon Report*), the Crown's case relied on the cumulative effect of the similarities of "trace materials"[45] between the crime scene and Splatt's house. All of this evidence was later found to be unreliable.[46]

In the murder conviction of Douglas Harry Rendell, a subsequent inquiry (*The Hunt Report*) found critical blood tests unreliable, and recommended a pardon.[47] Similar results were reached in the case of Gidley in New South Wales, with blood tests dating back to 1983, and Cannon, a 1991 case with degraded DNA samples.[48]

Curiously, legal analysts in Australia have suggested that eyewitness misidentification, a major cause of wrongful convictions in North America, has *not* emerged as a major cause in Australia. That noted, established North American patterns clearly emerged including: [49]

a) police practices (over-zealousness, unprofessional conduct, incompetence);
b) unreliable evidence (expert as an advocate or protagonist, weak circumstantial evidence);
c) unreliable secondary sources (police informants, prison informants, etc.); and
d) media and public pressure to convict.

New Zealand has not avoided the specter of wrongful convictions. In 1970, Arthur Allen Thomas was charged with the murder of two people. After a series of trials, appeals, retrials and petitions

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[43] Paul R. Wilson, "When Justice Fails: A Preliminary Examination of Serious Criminal Cases in Australia," 24 *Australian Journal of Social Issues* 3 (1989), at page 12.

[44] Judy Bourke, *Misapplied Science: Unreliability in Scientific Test Evidence*, (1993) 10 Aust. Bar Rev. 123, quoted with approval in the *Morin Inquiry* at page 276 *et seq.* and page 327, and 342.

[45] Trace materials included seed particles, paint particles, human hair and cloth fibers.

[46] Paul R. Wilson, *supra.*; *Morin Inquiry* at page 284, although it is equally clear that "tunnel vision" also played a role: *Morin Inquiry*, at page 1137.

[47] Judy Bourke, *supra.*; *Morin Inquiry*, at page 287.

[48] Judy Bourke, *supra.* at pages 136-7; Paul R. Wilson, *supra.*, at pages 11-12.

[49] Paul R. Wilson, *supra.* at page 8 *et seq.*

to the Governor General, Thomas remained convicted.[50] Concerned forensic scientists, who had testified at trial for the defence, published two books questioning the validity of certain key evidence,[51] and a 1978 book *Beyond Reasonable Doubt?* by British author David Yallop prompted the Prime Minister of New Zealand to appoint an eminent counsel to review the case.[52] As a result, Thomas received a free pardon. A Royal Commission subsequently was established to investigate the circumstances surrounding his conviction.

The chair of the Royal Commission, the Honourable R.L. Taylor, a former Justice of the Supreme Court of New South Wales, noted that the "case had always attracted widespread publicity and public concern."[53] In a damning report, Taylor concluded: a key exhibit at trial had been fabricated and planted at the crime scene by two of the investigating police officers; another exhibit had deliberately been switched by police; police had engaged in an intentional cover up of their activities; and a scientific expert witness had displayed "a disturbing lack of neutrality" during and after testifying.[54] The "high-handed and oppressive actions of those responsible for his convictions" prompted Taylor to recommend an *ex gratia* compensation payment of $1 million[55] – advice that the New Zealand government followed with little hesitation.

The Australian and New Zealand reports during the 1980s are significant for two reasons. No longer was forensic evidence inviolable. The scientist in the white lab coat could be wrong – either through inadvertence, incompetence or outright fraud and perjury. More significantly, their experience illustrates that the cases in which the public are most concerned (brutal murders and the killing of young children, for instance) and where the stakes are the highest, are precisely the types of cases where those responsible for bringing a perpetrator to justice resort to tactics that ultimately undermine the entire case for the prosecution.

i) IRA Bombings in Britain

On January 30, 1972, "Bloody Sunday," British paratroopers killed 13 unarmed Catholics during a peaceful civil rights march in Londonderry. On July 21, 1972, the IRA rocked Belfast with 22 bombs in 75 minutes, leaving nine dead and 130 injured. A politically fueled bombing campaign ensued during the next decade, with 3,637 lives lost in what the Irish now refer to as "The Troubles."[56]

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[50] *Report of the Royal Commission to Inquire into the Circumstances of the Convictions of Arthur Allen Thomas for the Murders of David Harvey Crewe and Jeanette Lenore Crewe* (Wellington, New Zealand: Government Printer, 1980), at pages 13-17.

[51] Dr. T. J. Sprott and Pat Booth, *ABC of Injustice: The Thomas Case* (Auckland: Arthur Thomas Retrial Committee, not dated, 39 pages); *Trial by Ambush*, by P.J. Booth, both of which are referred to in the *Report of the Royal Commission, ibid.*, at page 16.

[52] *Beyond Reasonable Doubt?*, by David Yallop (London: Hodder and Stoughton, 1978). Parenthetically, Mr. Yallop subsequently testified for the defence during the trial of the Maguire Seven. Sir John May found, however, that Yallop had been effectively and successfully discredited in cross-examinations by Sir Michael Havers, then Attorney General of England and Wales. See the discussion of this point, *Morin Inquiry*, at pages 271-2.

[53] Royal Commission report, *supra* at page 16.

[54] *Ibid* at pages 96-98.

[55] *Ibid.* at page 120.

This was not, however, just an issue of statistics. Most of those killed were civilians: mothers, fathers, shoppers, pub-goers and children. The public was outraged and frightened. In many minds, the IRA had become "Public Enemy Number One." It was from this pool of citizens that police investigators would be selected to investigate IRA bombings over the next several years. And it was from precisely this same pool that judges and jurors would hear cases that, regrettably, led to miscarriages of justice in Britain during the 1980s.

- ***Guildford Four***

Their collective name is well known: The Guildford Four (Paul Hill, Gerard Conlon, Patrick Armstrong and Carole Richardson) spent 14 years in prison before their convictions for two IRA bomb explosions in Guildford on October 5, 1974, were quashed by the Court of Appeal in 1989.[57] Hill, only 21 when he was arrested, spent more than 1,600 days in solitary confinement.

Gerry Conlon, a 20-year-old, happy-go-lucky, hard drinking petty thief who liked to chase girls, said this of the "confessions" he had signed during the police investigation:[58]

> When I signed them, I believed I would later be able to retract them. I believed they could never be shown to hold water. I didn't realize I was signing away my liberty for the next 15 years.

He added:[59]

> I think in the end it boiled down to the fact that the lawyers were terrified of dealing with terrorist offences, uncertain about the new Act, ignorant about the IRA and how it operates and overwhelmed by the blind determination of the police to get us convicted at any cost.

In 2000, Prime Minister Tony Blair apologized to the Guildford Four for their wrongful conviction. In a letter, Mr. Blair acknowledged the "miscarriage of justice" which they suffered as a result of their wrongful convictions. The apology, personally signed by the Prime Minister, was sent by him to Paul Hill's wife, Courtney Kennedy Hill, the daughter of the assassinated

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[56] *Irish Republican Army*: www.terrorismanswers.com/groups/ira.html at page 2; *Lost Lives*: www.rte.ie/news/archive/lostlives/adams.html

[57] The case of The Guildford Four was immortalized in the book *In The Name Of The Father* (Penguin Books: 1993) and in the movie *In The Name Of The Father*, released by Universal Pictures in 1993, starring Daniel Day-Lewis and Emma Thompson.

[58] *Justice: Denied* - - The Magazine for the Wrongly Convicted: www.justicedenied.org/inthenameofthefather.htm at page 2.

[59] *Ibid.* at page 4.

American Attorney General Robert Kennedy and niece of the late John F. Kennedy. The Prime Minister said: "I believe that it is an indictment of our system of justice and a matter for the greatest regret when anyone suffers punishment as a result of a miscarriage of justice. There were miscarriages of justice in your husband's case, and the cases of those convicted with him. I am very sorry indeed that this should have happened."[60]

○ *Birmingham Six*

Five weeks after the bombing at Guildford, two further explosions occurred at pubs in Birmingham in the British Midlands.[61] Twenty-one people were killed, and 162 injured. One week earlier, an active member of the IRA, James McDade, had been killed when a bomb he was in the process of planting at a telephone exchange exploded prematurely.[62] The bombs were of similar construction to all of those that exploded during the 1974 IRA campaign.[63]

Six Irish Catholic men were charged with 21 counts of murder, convicted by a jury, and spent 16 years in jail before being freed by the Court of Appeal in 1991.[64] On behalf of the court, Lloyd, L.J. noted that on the basis of the evidence led at trial, the case was convincing. Nonetheless, two parts of the evidence were suspect: scientific evidence concerning bomb traces, and the police interviews. The forensic evidence was in doubt, the court concluded, and several of the police investigators "were at least guilty of deceiving the court."[65]

The Birmingham Six, as they became known, had been vilified for years as Britain's biggest mass murderers. When they emerged onto the steps of the Old Bailey in 1991, after the Court of Appeal had quashed their convictions, psychologists said they were in a condition similar to those persons who have been at war.[66]

○ *McGuire Seven*

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[60] BBC News: Blair Apologizes to Guildford Four, http://news.bbc.co.uk/1/hi/northern_ireland/778940.stm; also see: http://innocent.org.uk/cases/guildford4/

[61] *R v McIlkenny* (1991), 93 Cr. App. R. 287 (C.A.).

[62] *Ibid.* at page 289.

[63] *Ibid.*

[64] *Ibid.*

[65] *Ibid.* at page 318. The case has been the subject of several books: for instance, see Bob Woffinden, *Miscarriages of Justice* (London: Hodder and Stoughton, Ltd. 1965); Paddy Joe Hill and Gerard Hunt, *Forever Lost, Forever Gone* (London: Bloomsbury Publishing Ltd., 1995).

[66] *Miscarriages of Justice: The Birmingham Six*, www.guardian.co.uk/crime/article/0,2763,634024,0.html That same day, March 14th, 1991, the Government of the United Kingdom established the Royal Commission on Criminal Justice, chaired by Viscount Runciman. Its mandate was to review the criminal justice process in England and Wales as a whole, including "the role of experts in criminal proceedings, their responsibilities to the court, prosecution and defence, and the relationship between the forensic science services and the police," discussed in the *Morin Inquiry*, at page 276.

Science continued to come under the microscope in further IRA prosecutions that resulted in wrongful convictions. The McGuire Seven, a family led by Annie McGuire, were imprisoned in 1976 for possessing explosives.[67] In the wake of the release of the Guildford Four in October, 1989 and calls for the review for the Birmingham Six, a report by former appeals judge John May persuaded the Home Secretary that there had been a miscarriage of justice in the McGuire Case. In July 1990, he referred the matter to the Court of Appeals; all seven of the convictions were overturned in June 1991.[68]

The McGuire Seven had been accused of running an IRA bomb factory in North London in the mid-1970s. Unlike the Guildford Four trial, scientific evidence played a pivotal role in the trial of the McGuire Seven. Critical Crown evidence included traces of nitroglycerine on the accused's hands and gloves. The Court of Appeal concluded that they may have been implicated through innocently touching a contaminated towel. Lord Justice McCowan said:[69]

> The evidence does not enable us to conclude who the person or persons were who so contaminated the towel or the gloves. On the ground that the possibility of innocent contamination cannot be excluded, *and on this ground alone*, we think the convictions of the appellants are unsafe and unsatisfactory.

Others, however, thought differently. Brian Ford, a leading scientist, openly questioned whether there had been a closing of ranks, and expressed concern that the Crown scientists had been operating a state-run service to get convictions, rather than offering independent scientific expertise.[70] He appears to have been right, and the IRA saga got even worse.

- ***Judith Ward***

Judith Ward was convicted in 1974 of 12 counts of murder and three charges of causing an explosion.[71] In three separate incidents, bomb explosions, thought to be the work of the IRA, had caused horrific damage and loss of life. The case for the Crown rested on confessions Ward made to the police and expert evidence from government scientists that traces of nitroglycerine had been found on her. She was sentenced to life in prison, and appealed neither conviction nor sentence.

Seventeen years later, the Home Secretary referred her case to the Court of Appeal for a reassessment. It was said that she suffered from a mental disorder that explained her statements to police. It was also contended that both the police and prosecution had failed to disclose evidence that would have affected the course of the trial. The most serious contention concerned the scientific evidence. It was alleged that supposedly neutral scientists had deliberately supported the prosecution efforts to convict Ward and had suppressed evidence favorable to the defence. In the end, however, the conclusions of the Court of Appeal were even more serious that that.

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[67] *McGuire Seven*, http://innocent.org.uk/cases/mcguire7

[68] (1992), 94 Cr. App. R. 133.

[69] *Ibid.*

[70] Laboratorynews: http://www.sciences.demon.co.uk/aforensc.htm

[71] *R v Ward*, [1993] 2 All E.R. 577 (C.A.).

Glidewell, J. on behalf of the unanimous court, concluded that three senior government scientists called as Crown witnesses at trial had deliberately misled the court; that they had done so in concert; and that they had taken "the law into their own hands, and concealed from the prosecution, the defence and the court, matters which might have changed the course of the trial."[72] His assessment of the conduct of these three scientists was searing:[73]

> For the future it is important to consider why scientists acted as they did. For lawyers, jurors and judges, a forensic scientist conjures up the image of a man in a white coat working in a laboratory, approaching his task with cold neutrality, and dedicated only to the pursuit of scientific truth. It is a sombre thought that the reality is sometimes different. Forensic scientists may become partisan. The very fact that the police seek their assistance may create a relationship between the police and the forensic scientists. And the adversarial character of the proceedings tends to promote this process. Forensic scientists employed by the government may come to see their function as helping the police. They may lose their objectivity. That is what must have happened in this case.

Appellate courts generally confine their conclusions to the facts of the case and rarely outline the lessons learned from the evidence. But that is precisely what the Court of Appeal did in this case. Asking what lessons can be learned from this miscarriage of justice, Justice Glidewell noted the importance of balancing the need to reduce the risk of conviction of the innocent with the public interest in avoiding a multiplicity of rules that merely impede effective law enforcement. In his view, there were two lessons learned.[74] The first centred on the fact that the expert witnesses had become partisan:[75]

> First, we have identified the cause of the injustice done to Miss Ward on the scientific side of the case as stemming from the fact that three senior forensic scientists at the Royal Armaments Research and Development Establishment (RARDE) regarded their task as being to help the police. They became partisan. It is

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[72] *Ibid.*

[73] *Ibid.*

[74] *Ibid.*

[75] *Ibid.*

> the clear duty of government forensic scientists to assist in a neutral and impartial way in criminal investigations. They must act in the cause of justice…
>
> Secondly, we believe that the surest way of preventing the misuse of scientific evidence is by ensuring that there is a proper understanding of the nature and scope of the prosecution's duty of disclosure.

Roger Cook, an English forensic scientist who later testified before the *Morin Inquiry*, noted that this case caused "tidal waves" in the international forensic community.[76]

o ***Conclusions***

The legacy of the IRA bombing cases was three-fold. First, the cases demonstrate that the "hydraulic pressure" of public opinion[77] is capable of creating an atmosphere in which state authorities seek to convict someone despite the existence of ambiguous or contradictory evidence. Second, scientists working in government-operated laboratories may tend to feel "aligned"[78] with the prosecution, resulting in a perception that their function is to support the theory of the police[79] rather than to provide an impartial, scientifically-based analysis. This, in turn, raises issues concerning the physical location and reporting relationship of government or police forensic laboratories.

Finally, scientists relied upon by the Crown have an obligation to disclose to the prosecution evidence of any tests carried out which tend to cast doubt on the opinion proposed to be tendered in evidence; and the prosecution bears a parallel and continuing obligation to disclose those facts to the defence – irrespective of whether the defence has made a request for such disclosure.

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[76] *Morin Inquiry*, at page 268 (and see page 97).

[77] *Payne v Tennessee*, 501 U.S. 808 (1991), at page 868, quoting Oliver Wendell Holmes' famous statement in a dissenting judgment in *Northern Securities Co. v U.S.*, 193 U.S. 197 (1904), at pages 400-401.

[78] In the *Morin Inquiry*, at page 298, the Honourable Fred Kaufman quoted with approval the following extract from the Crown's prosecution policy manual: "Because forensic scientists working in government-operated laboratories are more familiar with police and prosecution personnel and with prosecutorial approaches and concerns, there may be a tendency for them to feel 'aligned' with the Crown. In some jurisdictions this understandable relationship between the prosecution and forensic scientists has resulted in a perception on the part of the scientists that their function was to support the police theory. Such a perception is wrong and has the potential to contribute to a miscarriage of justice." Generally, see the discussion of Fred Zain, *infra*.

[79] *Ibid.*

j) United States: Wrongful Executions, Not Just Wrongful Convictions

Debate about whether wrongful convictions have occurred in the United States of America has been linked extricably with the imposition of the death penalty in that country.[80] Borchard made the point in 1932.[81] Two scholars fueled the debate in the 1980s,[82] and the controversy that has raged since then has caused one state to direct a moratorium on the imposition of the death penalty, and the governor of that state to pardon four inmates and commute the sentence of everyone else on death row.[83]

In 1987, Professors Hugo Bedau, of Tufts University, and Michael Radelet, of the University of Florida, published a study of 350 cases in *Miscarriages of Justice in Potentially Capital Cases*.[84] These cases, heard by courts in the United States between 1900 and 1986, concerned 139 persons subsequently proven to be innocent. All had been sentenced to death and a number came within hours or days of being executed, before executive (or judicial) action saved them.

Continuing in the tradition pioneered by Borchard, these researchers concerned themselves with "wrong-person mistakes" – the conviction or execution of the *factually innocent*.[85] They were not concerned with the erroneous conviction of those who are *legally* innocent, such as those killing in self-defence, or situations where the case failed because the evidence demonstrated a violation of the accused's constitutional rights.[86]

Bedau and Radelet concluded that there were four main causes of miscarriages of justice in death penalty cases:[87] first, and most importantly, errors by witnesses (such as mistaken eyewitness identification; witness perjury; unreliable or erroneous prosecution testimony); second, police error (such as coerced confessions and overzealous or negligent police work); third, prosecution error (such as suppressing exculpatory evidence); and, finally, other errors such as misleading circumstantial evidence, inadequate consideration of alibi evidence, or the consequences flowing from an outraged community that demands conviction.

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[80] In this respect, the debate in the United States is somewhat unique: see Michael L. Radelet et al, *Death Penalty Symposium: Prisoner's Released from Death Rows Since 1970 Because of Doubts About Their Guilt*, 13 T. M. Cooley L. Rev. 907 (1996); Michael L. Radelet, "Wrongful Convictions of the Innocent," 86 *Judicature* 67 (2002). It is clear, however, that the availability of the death penalty in the United States has had an impact on other countries in many ways: see, for instance *U.S.A. vs Burns*, (2001), 151 C.C.C. (3d) 97 (S.C.C.).

[81] Edwin M. Borchard, *supra*.

[82] Bedau and Radelet, *supra*.

[83] Jodi Wilgoren, the *New York Times*: *Systemic Problems Compel Illinois Governor to Commute Remaining Death Sentences*: http://www.tcask.org (January 11, 2003); Ryan's speech can be found at: www.initiative-gegen-die-todesstrafe.de/George%20Ryan%20.htm.

[84] (1987), 40 Stanford Law Rev. 21.

[85] Those defendants convicted of homicide or rape and sentenced to death where no such crime had actually occurred, or the defendant was legally and physically uninvolved in the crime: *Ibid.* at page 45.

[86] *Ibid.* at pages 45-6.

[87] *Ibid.* at page 56 *et seq.*

The close link between the controversy over the death penalty and the emergence of wrongful convictions in the United States became apparent in the conclusions reached by Bedau and Radelet. They conceded that there was no evidence that ending the death penalty would reduce the likelihood of wrongful convictions. They maintained, however, that "no evidence is needed to support the claim that complete abolition of the death penalty would eliminate the worst of the possible consequences that accrue from wrongful convictions in what are now capital cases."[88]

Since then, the death penalty debate has continued to be dominated by the fear that the innocent will be sentenced to die.[89] Nine years after their seminal work on the subject, Radelet and Bedau republished their views,[90] this time observing that in the United States, the risk of executing the innocent is "inevitable."[91] The issue of race was also raised:[92]

> Blacks today make up about 40% of those on death-row in America, and also approximately 40% of the cases in which people are released from death-row because of doubts about their guilt.

Parallel conclusions about the nexus between the death penalty and wrongful convictions in the United States have since been reached by a number of scholars,[93] practitioners,[94] members of the judiciary,[95] and the media.[96]

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[88] *Ibid.* at page 90.

[89] Radelet and Bedau, *supra.*; Keith A. Findley, *supra.*; *Report of the Governor's Commission on Capital Punishment* submitted to Illinois Governor George H. Ryan in 2002, *infra.*; Barry Scheck, Peter Neufeld and Jim Dwyer, *Actual Innocence: When Justice Goes Wrong and How to Make it Right*, originally released as *Actual Innocence: Five Days to Execution, and Other Dispatches From The Wrongfully Convicted* (New York: Signet, 2001).

[90] On this occasion the authors published as "Radelet and Bedau" as opposed to "Bedau and Radelet."

[91] *Ibid.* at page 919.

[92] *Ibid.* at page 917; more recently, see Karen F. Parker, Mari A. DeWees and Michael L. Radelet, "Race, the Death Penalty, and Wrongful Convictions," 18 *Criminal Justice* 49 (2003).

[93] Keith A. Findley, *supra.*, at "Part C"; David Horan, *The Innocence Commission: An Independent Review Board For Wrongful Convictions*, 20 N. Ill. U. L. Rev. 91 (2000); Michael J. Saks, *Model Act: Model Prevention and Remedy of Erroneous Convictions Act*, 33 Ariz. St. L. J., 665 (2001); James S. Liebman, "Rates of Reversible Error and the Risk of Wrongful Execution," 86 *Judicature* 78 (2002).

[94] Barry Scheck *et al*, *supra.*

[95] The Constitution Project, *Mandatory Justice: 18 Reforms to the Death Penalty*, referred to by Keith A. Findley, *supra.*, at footnote 91. [his text]; Gerald Kogan, "Errors of Justice and the Death Penalty," 86 *Judicature* 111 (2002) [Mr. Kogan is a former prosecutor, defence counsel, trial judge, appellate judge and Chief Justice of the Florida Supreme Court].

In 2000, Illinois Governor George Ryan declared a moratorium on executions in that state. The moratorium was prompted by serious questions about the operation of the capital punishment system in Illinois, which were highlighted most significantly by the release of former death-row inmate Arthur Porter after coming within 48 hours of his scheduled execution date. Porter was released from death-row following an investigation by journalism students who obtained a confession from the real murderer in the case. The moratorium subsequently sparked a nation-wide debate on the death penalty.

In March 2000, Ryan appointed a Commission to advise him, and on April 15, 2002, the commissioners published their report. It reviewed and relied upon a wide range of information, studies, and previous inquiries, including the *Morin and Sophonow Inquiries* from Canada.[97]

All members of the Commission believed, with the advantage of hindsight, "that the death penalty had been applied too often in Illinois since it was re-established in 1977."[98] A narrow majority of the 17-person Commission[99] favored abolition of the death penalty in the state; overall, however, the main conclusion of the Commission was that if capital punishment was to be retained, a number of significant reforms were indispensable to a fair death penalty scheme in the state.[100]

The lengthy report makes 85 specific recommendations for reforms, including recommendations to require video-taping of interrogations in capital cases; to review police procedures for obtaining eyewitness identifications; to reduce the number of circumstances under which the death penalty may be imposed; to increase the funding and training of lawyers and judges involved in capital cases; to intensify the scrutiny of the testimony of in-custody informants; and to implement new procedures for review of capital sentences.

Drawing heavily from the *Morin and Sophonow Inquiries*, and in some instances adopting recommendations from those reports verbatim, the Commission gave particular emphasis to the critical role of defence counsel:[101]

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[96] Frederick Drimmer, *Until You Are Dead* (New York: Pinnacle Books, 1990).

[97] *Report of The Governor's Commission on Capital Punishment*, submitted to George H. Ryan, Governor of Illinois, the 15th of April, 2002 (State of Illinois, 2002). The Commissioner's report draws heavily from the *Morin and Sophonow Inquiries*, especially concerning tunnel vision (page 20); jailhouse informants (pages 40 and 121); training (page 40); police culture (page 45); and recording statements (page 30).

[98] *Ibid.* at page i.

[99] *Ibid.* at pages v – vii. The Commission was composed of a retired Federal Judge as Chair, several serving or former prosecutors and public defenders, defence counsel, senior litigators from the private sector, a company president, a lawyer and author (Scott Turow) and, as Special Advisor, William Webster, a senior partner with a Washington law firm who was formerly an Appellate Judge, and Director of both the FBI and the CIA.

[100] *Ibid.* at page iii.

[101] *Ibid.* at page 191.

> The Commission's analysis of the more than 250 cases in which the death penalty has been imposed in the years since 1977 revealed that some 21% of the reversals were the result of deficiencies in the conduct of defence counsel. Roughly 26% of the cases were reversed based upon conduct by a prosecutor that the Supreme Court found to be improper and reversible. Together, these two types of errors account for a substantial number of the cases reversed on appeal.

"The provision of qualified counsel," the Commission concluded, "is perhaps the most important safeguard against the wrongful conviction, sentencing and execution of capital defendants."[102]

Governor Ryan's response to the Commission's report caught many by surprise. Nine months following receipt of the report, and just three days before the end of his term as Governor,[103] Ryan pardoned four inmates and, the following day, commuted the sentences of all 167 remaining death-row inmates in the state.[104] In an hour-long speech, Ryan quoted Abraham Lincoln, Supreme Court Justices Stewart and Blackmun, and expressed frustration over his inability to gain the support of the legislature in fundamental justice reforms:[105]

> Three times I proposed reforming the system with a package that would restrict the use of jailhouse snitches, create a state-wide panel to determine death eligible cases, and reduce the number of crimes eligible for death. These reforms would not have created a perfect system, but they would have dramatically reduced the chance for error in the administration of the ultimate penalty.
>
> The Governor has the constitutional role in our state of acting in the interest of justice and fairness. Our state constitution provides broad power to the Governor to issue reprieves, pardons and commutations. Our Supreme Court has reminded inmates petitioning them that the last resort for relief is the governor. At times the executive clemency power has perhaps been a crutch for courts to avoid making the kind of major change that I believe our system needs.

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[102] *Ibid.* at page 105. A co-chair of the Commission has since published an article which emphasizes that implementation of the recommendations will provide significant safeguards against further wrongful convictions in both capital *and* non-capital cases: Thomas P. Sullivan, "Preventing Wrongful Convictions," 86 *Judicature* 106 (2002).

[103] At the time, the media observed that Ryan himself was under criminal investigation and may be indicted in a corruption scandal: Jodi Wilgoren, *supra.*

[104] Jodi Wilgoren, *ibid.*; *Death-Row Inmates Pardoned*, *Winnipeg Free Press*, Saturday, January 11, 2003, at page A18.

[105] www.initiative-gegen-die-todesstrafe.de/George%20Ryan%20.htm, *supra.*, at page 10 of 11.

> Our systemic case-by-case review has found more cases of innocent men wrongfully sentenced to death-row. Because our three-year study has found only more questions about the fairness of the sentencing; because of the spectacular failure to reform the system; because we have seen justice delayed for countless death-row inmates with potentially meritorious claims; because the Illinois death penalty system is arbitrary and capricious – and therefore immoral – I no longer shall tinker with the machinery of death. I cannot say it as eloquently than Justice Blackmun. The legislature couldn't reform it. Lawmakers won't repeal it. But I will not stand for it. I must act.
>
> Our capital system is haunted by the demon of error – error in determining guilt, and error in determining who among the guilty deserves to die. Because of all of these reasons today I am commuting the sentences of all death-row inmates... There have been many nights where my staff and I have been deprived of sleep in order to conduct our exhaustive review of the system. But I can tell you this: I will sleep well knowing I made the right decision.

The Innocence Project at the Benjamin N. Cardozo School of Law of Yeshiva University in New York was created by Barry C. Scheck and Peter J. Neufeld in 1992. It was set up as, and remains, a non-profit legal clinic. The Project only handles cases where post-conviction DNA testing of evidence can yield conclusive proof of innocence. As a clinic, students handle the case work while supervised by a team of attorneys and clinic staff. It has helped to organize The Innocence Network, a group of law schools, journalism schools, and public defender offices across the U.S., that assists inmates trying to prove their innocence.

To date, the Innocence Project reports 143 exonerations based on DNA testing. In their book *Actual Innocence*,[106] Scheck and Neufeld state that in the first 130 DNA exonerations, mistaken identification was the cause in 101 (78 per cent), false confessions in 35 (27 per cent) and jailhouse informants in 21 (16 per cent). The average length of incarceration was 10.45 years and the total time served by 136 exonerated defendants was 1,470 years. Six-one per cent of the exonerated defendants were Black, while 78 per cent of their victims were white. They note that the states with the most post-conviction DNA exonerations – Illinois (23) and New York (14) – were the first two states with statutes authorizing post conviction DNA testing for inmates.

Scheck and Neufeld state that with DNA testing, "a moment of rare enlightenment" is at hand:[107]

> For generations, American lawyers and crusaders have fought to overturn the convictions of people they believed innocent. Until recently, they had to rely on witnesses to recant or for the real perpetrators to confess. In what seems like a flash, DNA tests performed during the last 15 years not only have freed 132

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[106] New America Library, December 2003.

[107] *Ibid* p. xvii.

> individuals but have exposed a system of law that has been far too complacent about its fairness and accuracy. What matters most is not how these people got out of jail but how they got into it.

The authors state that there are likely thousands of innocent people in prison who will likely never be freed because most crimes do not have biological evidence – blood, semen, hair, skin – which can be tested for DNA.[108]

> "Our procedure," wrote Justice Learned Hand in 1923, "has always been haunted by the ghost of the innocent man convicted. It is an unreal dream." Today, those ghosts walk the land. But Hand's unreal dream is costing little sleep. The innocent neither count nor are they counted. Every unit of government, from the smallest locality to the U.S. Justice Department, totes crimes, complaints, warrants, arrests, indictments, pleas, dispositions, trials, jury trials, judge trials, verdicts, sentences, paroles, appeals, opinions. An entire division of the federal government tracks the quantity of felonies. Many states have similar machinery. Statistics are kept by the gigabyte and the shelf-full.
>
> Yet not one number is assigned to represent the distinct matter of the innocent person. No one has the job of figuring out what went wrong, or who did wrong. No account is taken of the innocent person, wrongly convicted, ultimately exonerated. The moment has come to do so.

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[108] *Ibid.* p. xx.

CHAPTER 3 - CANADIAN COMMISSIONS OF INQUIRY

Canada has, unfortunately, not been immune to the global problem of wrongful convictions.

Despite some legal cultural differences from the countries surveyed in the preceding chapter, Canada too has had several high-profile cases of the innocent being convicted of crimes they didn't commit. Many of the factors that have contributed to miscarriages of justice elsewhere are also apparent in the Canadian cases as well.

However in one sense, Canada is unique - full public inquiries have often been held after high-profile cases of wrongful conviction are confirmed.

Three such provincial inquiries have already been held, a fourth is underway in Newfoundland and Labrador and a fifth was recently called in Saskatchewan.

These inquiries generally are not confined to the facts leading to a particular miscarriage of justice, but are wide-ranging examinations of the systemic causes of wrongful convictions in Canada and elsewhere. The resulting reports are among the most comprehensive analyses of wrongful convictions and are oft-cited around the world.

In October 1986, a Royal Commission was appointed to review the case of Donald Marshall, who was wrongly convicted of the 1971 murder in Sydney, Nova Scotia of 17-year-old Sandy Seale and spent 11 years in prison.

The inquiry was composed of three judges - Chief Justice T. Alexander Hickman of Newfoundland, Associate Chief Justice Lawrence A. Poitras of Quebec, and Mr. Justice Gregory Thomas Evans from Ontario. After hearing 113 witnesses in 93 days of public hearings, it reported in December 1989.[109]

Ten years later, in June 1996, the Honourable Fred Kaufman, Q.C., formerly a judge of the Quebec Court of Appeal, was appointed by the Ontario government to look into the case of Guy Paul Morin.

On July 30, 1992, Morin was convicted of the murder of his next-door neighbor, nine-year-old Christine Jessop. It was not until January 23, 1995, almost 10 years after he was first arrested and two trials later, that Morin was exonerated as a result of DNA testing not previously available. The real killer has never been found.

During the public hearings, which lasted 146 days, 120 witnesses were called. Over 100,000 pages of trial evidence, exhibits and documents filed on appeal were considered. Twenty-five parties were given standing and a number of witnesses were called to testify who were either experts or participants in the administration of criminal justice from around the world.

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[109] *The Royal Commission on the Donald Marshall, Jr., Prosecution*, hereafter referred to as the *Marshall Inquiry*.

Kaufman released his two-volume report on April 9, 1998.[110] It contained 1,380 pages, and made 119 recommendations for change, many of which were systemic in nature. Bruce MacFarlane says his report "is arguably the most comprehensive judicial review that has ever been undertaken into the causes of wrongful conviction, and how to avoid them."

In June 2000, former Supreme Court Justice Peter Cory was appointed by the Manitoba Government to look into the case of Thomas Sophonow.

Sophonow was tried three times for the murder of 16-year-old Barbara Stoppel and each time the Court of Appeal overturned the conviction. In 1998, the Winnipeg Police Service undertook a reinvestigation of the murder and on June 8, 2000, it announced that Sophonow was not responsible for the murder and that another suspect had been identified. On that same day, the Manitoba Government issued a public apology to Sophonow for having "endured three trials and two appeals, and spent 45 months in jail for an offence he did not commit."

Cory reported in September 2001.[111]

In March 2003, former Supreme Court of Canada Chief Justice Antonio Lamer was appointed to study three cases for the Government of Newfoundland and Labrador, one of which is an acknowledged case of wrongful conviction.[112] He is to report in December 2005.

In February 2004, the Saskatchewan Government appointed Mr. Justice Edward P. MacCallum of the Alberta Court of Queen's Bench to study the case of David Milgaard, who spent 23 years in prison for a murder he didn't commit.[113]

The following chart compares the recommendations made by the three inquiries, which have reported to date. As well, each of the following chapters reproduces those inquiry recommendations relevant to the subject discussed in the chapter.

The purpose of this report is clearly not to respond to each and every inquiry recommendation, nor is the Working Group necessarily endorsing them simply by reproducing them. However, these recommendations serve as a useful point of departure for discussion and have been carefully considered in the Working Group's deliberations. As well, in many jurisdictions, much has been done to respond to, and implement, these recommendations and that too is highlighted in each chapter.

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[110] *The Commission on Proceedings Involving Guy Paul Morin*, hereafter referred to as the *Morin Inquiry*.

[111] *The Inquiry Regarding Thomas Sophonow*, hereafter referred to as the *Sophonow Inquiry*.

[112] The press release announcing Lamer's appointment is at http://www.gov.nf.ca/releases/2003/just/0321n03.htm

[113] The press release announcing MacCallum's appointment is at http://www.gov.sk.ca/newsrel/releases/2004/02/20-064.html

CAUSES	**RECOMMENDATIONS**		
1. Forensic Evidence	**MARSHALL**	**MORIN**	**SOPHONOW**
		• Limitations on forensic evidence has to be appreciated by all the parties in a court proceeding and explained to the jury • Forensic material should be retained to allow for replicate testing • Scientists should be working to challenge or disprove a hypothesis rather than to prove one • Defence should have access to forensic experts • Scientists should be trained in testifying so their evidence isn't misinterpreted	• All reasonable tests should be performed on the evidence (duty of Prosecution and Police)
2. In-Custody (Jailhouse) informants	Limited use		Prohibited except in rare circumstances (e.g., kidnapping where witness knows whereabouts of victim)
(a) Prosecution procedure for using in-custody informers		• Crown policy should reflect dangers of such evidence • Reliability of evidence is key (lists 13 criteria on assessing reliability)	3 criteria from Morin are focused on: [(1) information could only be known by one who committed the offence; (2) information is detailed and revealing; (3) confirmed by police investigation as correct and accurate] AND the other 10 are also noted
(b) Jury warning		Warning stronger than a *Vetrovec* should be given	Very strong direction as to the unreliability of the evidence

3. Police	**MARSHALL**	**MORIN**	**SOPHONOW**
(a) Training of officers	• More intensive training for cadets involved with high profile crimes • Training should be monitored by parties outside the police force • Evaluation of investigative capabilities • Training with respect to sensitivity on visible minority issues	Setting of minimum standards respecting initial and on-going training	Attendance at annual lecture/course for all officers on tunnel vision
(b) All interviews conducted with suspects should be video/audio-taped	Recommended	Recommended • If not videotaped, trial judge can draw negative inference	Recommended • If not videotaped, general rule is should be inadmissible
(c) Police should be encouraged to videotape interviews with witnesses whose testimony may be challenged in court		Recommended • Training for police interview techniques to enhance reliability	• Interviews with alibi witnesses should be video/audio taped and inadmissible if not transcribed
(d) Special care to be given for certain categories of witnesses when interviewing	Recommended for youth or mentally unstable witnesses/suspects		Alibi witnesses should not be influenced or interrogated
(e) Alibi witnesses: officers other than officers involved in investigation of accused should investigate alibi of accused		Recommended	Recommended
(f) Avoidance of tunnel vision		• Education of police officers on how to identify and avoid tunnel vision • Status of investigating officers should not be elevated for pursuing "best" lead/suspect	Attendance at annual lecture/course for all officers on tunnel vision
(g) Use of polygraphs		Police should be instructed as to the proper use and limitations of polygraphs	

3. Police	Marshall	Morin	Sophonow
(h) Limited Use of Criminal Profiling		Police should use as an investigative tool only	
(i) Must be a comprehensive and consistent retention policy for Police Notebooks		• Notebooks should be easily located • Ultimate goal should be towards computerization	• Notebooks should not be stored by individual officers • Should be stored by the municipality (might be preserved on microfiche) • Kept for 20-25 years
(j) Preservation of exhibits			• Exhibits should be kept for 20 years
(k) Eye Witness Identification			• Lays out additional procedure for live line-up identification • Lays out additional procedure for photo-pack line-up identification • Strong and clear directions to jury on frailties of eye-witness identification • Expert evidence on accuracy of eye-witness identification should be readily admitted
(l) Missing Person Investigations		• Police should be mindful that it may escalate into major crime investigation and must take appropriate measures to preserve evidence • Lists proper procedure to employ in a body site search	
4. Crown			
(a) Training	Programs to identify and reduce system discrimination	• Crown should be educated on identification and avoidance of tunnel vision • Evidence of other suspects should be revisited	

4. Crown	**MARSHALL**	**MORIN**	**SOPHONOW**
(b) Strength of evidence		Crown duty not to raise evidence that is reasonably considered to be untrue	Will render trial unfair if Crown raises prejudicial issues without adequate evidence
(c) Interviewing Techniques		Lists criteria for increasing reliability of interviews including taping of interviews	
(d) Crown advocacy		Crowns should be trained on limits of Crown advocacy including being prevented from appealing jury acquittal	
(e) Crown disclosure	Amendments to Criminal Code re: disclosure	Creation of committee to review and discuss disclosure issues	
5. Lack of independent review of wrongful convictions	Independent board to review wrongful convictions	Independent board to review wrongful convictions	Independent board to review wrongful convictions
6. Relationship between Crown and Defence		Provincial government should provide funding for criminal bar to discuss relevant issues	Atmosphere of suspicion as between Crown and defence bar should be alleviated by regular meetings to discuss issues
7. Lack of disclosure of Alibi defence		Legislative amendments should be made to permit an accused's exculpatory statement made upon arrest in certain conditions	Disclosure by the defence should be within a reasonable time
8. Lack of sensitivity of the Criminal Justice System to visible minorities	• All levels of the Administration of Justice (Judiciary, Counsel, Corrections, etc.) should make efforts in this regard • Creation of separate community controlled Justice system for Aboriginal peoples		
9. Treatment of the Accused		Person charged with crime should be treated neutrally in court	

4. Crown	MARSHALL	MORIN	SOPHONOW
10. Jury Charge		Jury should be cautioned that evidence may be coloured by the criminal charges or other external factors such as the notoriety of the case	Jury should be cautioned with respect to eye-witness fallibility and unreliability of in-custody informants
1. Limited powers of the Court of Appeal		• Court of Appeal should be allowed to entertain "lurking doubt" when deciding whether to set aside a conviction • "Fresh evidence" powers of the Court of Appeal should be expanded/changed	
2. Procedure in Laying of charges	Sets out additional recommendations for Police and Crown		
3. Lack of Clarity of Public Interest Considerations	Lists criteria related to the public interest with respect to continuing a prosecution		

CHAPTER 4 - TUNNEL VISION

I. INTRODUCTION

Tunnel vision has been defined as "the single minded and overly narrow focus on an investigation or prosecutorial theory so as to unreasonably colour the evaluation of information received and one's conduct in response to the information."[114] Tunnel vision, and its perverse by-product "noble cause corruption,"[115] are the antithesis of the proper roles of the police and Crown Attorney. Yet tunnel vision has been identified as a leading cause of wrongful convictions in Canada and elsewhere.

The role of the Crown Attorney has received considerable judicial comment, with frequent emphasis upon the inherent fairness that is integral to the role. The most oft-quoted comment is from *Boucher v. The Queen*, where Rand J. said:[116]

> It cannot be over-emphasized that the purpose of a criminal prosecution is not to obtain a conviction, it is to lay before a jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime. Counsel have a duty to see that all available legal proof of the facts is represented: it should be done firmly and pressed to its legitimate strength but it must also be done fairly. The role of the prosecutor excludes any notion of winning or losing; his function is a matter of public duty than [sic] which in civil life there can be none charged with greater personal responsibility. It is to be efficiently performed with an ingrained sense of the dignity, the seriousness and the justness of judicial proceedings.

Crown Attorneys have enormous discretionary power, and the exercise of this discretion must be characterized by fairness and impartiality. The conduct of Crown Attorneys must be consistent with that expected of an Attorney General. Respect for the differing roles of all parties in the criminal justice system should be a hallmark of the Crown Attorney. Casting aside any perceived goal of "winning," the role of the Crown Attorney is quasi-judicial in nature. As stated in *Regan v. The Queen* (2002), 161 C.C.C. (3d) 97, "... objectivity and fairness is an ongoing responsibility of the Crown, at every stage of the process." The Crown Attorney, however, is still expected to be a strong and fearless advocate and hence assertive in putting forward the case. This dichotomy requires a careful balance between advocacy and objectivity. The prosecutor may adopt an adversarial role in the trial process, but the prosecutor should not be a zealot. Within the context of tunnel vision, the Crown Attorney must constantly strive to independently assess the police investigation and the evidence against an accused.

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[114] *Morin Inquiry* (Recommendation 74).

[115] Sometimes referred to as "process corruption," noble cause corruption includes situations where a wrongful conviction is knowingly obtained under falsehoods or improper procedures because the police and/or prosecutor believe the accused to be guilty.

[116] (1955) S.C.R. 16 at 24.

Specific factors that may contribute to Crown tunnel vision, and thus impair the proper role of the Crown Attorney, include:

(1) close identification with police and/or victim;
(2) pressure by the media and/or special interest groups; and
(3) isolation from other perspectives.[117]

Tunnel vision must be guarded against vigilantly, as it is a trap that can capture even the best police officer or prosecutor.

II. CANADIAN COMMISSIONS OF INQUIRY

All three Canadian inquiries into wrongful convictions have commented on the perils of tunnel vision, and have made recommendations for police and Crown education on the topic. The *Marshall Inquiry* emphasized the need for a separation between police and Crown functions. The *Sophonow Inquiry* recommended regular, mandatory training for police officers on tunnel vision. The *Morin Inquiry* extended this recommendation to include Crown Attorneys.

a) The Royal Commission into the Donald Marshall, Jr., Prosecution

The *Marshall Inquiry* stated that "in addition to being accountable to the Attorney General for the performance of their duties, Crown prosecutors are accountable to the courts and the public. In that sense, the Crown prosecutor occupies what has sometimes been characterized as a quasi-judicial office, a unique position in our Anglo-Canadian legal tradition" (pp. 227-28). The *Marshall Inquiry* emphasized that this role must remain distinct from (while still cooperative with) that of the police (at p. 232):

> We recognize that cooperative and effective consultation between the police and the Crown is also essential to the proper administration of justice. But under our system, the policing function -- that of investigation and law enforcement -- is distinct from the prosecuting function. We believe the maintenance of a distinct line between these two functions is essential to the proper administration of justice.

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[117] Loss of objectivity due to overexposure to particular crimes is arguably another factor.

b) The Inquiry Regarding Thomas Sophonow

Tunnel vision

- Tunnel vision is insidious. It can affect an officer or, indeed, anyone involved in the administration of justice with sometimes tragic results. It results in the officer becoming so focussed upon an individual or incident that no other person or incident registers in the officer's thoughts. Thus, tunnel vision can result in the elimination of other suspects who should be investigated. Equally, events that could lead to other suspects are eliminated from the officer's thinking. Anyone, police officer, counsel or judge can become infected by this virus.

- I recommend that attendance annually at a lecture or a course on this subject be mandatory for all officers. The lecture or course should be updated annually and an officer should be required to attend before or during the first year that the officer works as a detective.

- Courses or lectures that illustrate with examples and discuss this problem should be compulsory for police officers and they would undoubtedly be helpful for counsel and judges as well.

c) The Commission on Proceedings Involving Guy Paul Morin

> **Recommendation 74 - Education respecting tunnel vision**
>
> One component of educational programming for police and Crown counsel should be the identification and avoidance of tunnel vision. In this context, tunnel vision means the single minded and overly narrow focus on a particular investigative or prosecutorial theory, so as to unreasonably colour the evaluation of information received and one's conduct in response to that information.
>
> **Recommendation 92 - Structure of police investigation**
>
> Investigating officers should not attain an elevated standing in an investigation through acquiring or pursuing the "best" suspect or lead. This promotes competition between investigative teams for the best lead, results in tunnel vision and isolates teams of officers from each other.

III. MACFARLANE PAPER

In his paper, Bruce MacFarlane Q.C. noted that public outrage in high profile cases can translate into intense pressure on the police to arrest and on prosecutors to convict, with speed becoming the overriding factor. He explained how this can contribute to tunnel vision, at p. 40:

> Tunnel vision sometimes sets in. The investigative team focuses prematurely, resulting in the arrest and prosecution of a suspect against whom there is some evidence, while other leads and potential lines of investigation go unexplored. It is now clear that that is precisely what occurred in the cases of Morin and Sophonow.

MacFarlane emphasized that raising awareness of the existence of tunnel vision is critical. He recommended that seminars for police and prosecutors should be held, allowing for frank discussion of tunnel vision and stated that police should continue to pursue all reasonable lines of enquiry even where a viable suspect has been identified.

IV. PRACTICES CURRENTLY IN PLACE TO PREVENT TUNNEL VISION

Current Educational Efforts

- Education for Crowns on the role of the Crown and tunnel vision has been provided in a number of provinces. For instance, Crown training occurred in Newfoundland after the release of the *Morin Inquiry*, and again in 2003. Ontario hosted joint Crown, defence, police and forensic scientist conferences in the fall of 1998 to deal with the recommendations of the *Morin Inquiry*, and provided new Assistant Crown Attorney training in 1999 and 2000. In 2002, Manitoba hosted a post-*Sophonow Inquiry* conference with participation from defence, the Crown, and the judiciary.

- Several specialized courses, which incorporate and study some of the individual causes of wrongful conviction, are being conducted by police services and police academies. For instance, the major case management and general investigation courses include education on tunnel vision.

Crown Initiatives

- Crown policies on the role of the Crown have been issued in a number of provinces.

V. RECOMMENDATIONS

While the provision of lectures on the topic of tunnel vision are important, they are not the sole answer to its prevention. The best protection against tunnel vision is a constant and acute awareness of the role of the Crown Attorney, and the relationship of the Crown and police to each other and to other participants in the justice system.

The separation of police and Crown roles is a well-established principle of our criminal justice system. This separation has led to cultural differences that should be recognized by both groups. Mutual independence of Crowns and police is key to the prevention of tunnel vision, as it creates a system of institutional checks and balances. It is important to recognize, however, that different provinces have implemented this principle in various ways, and that varying nuances and complexities exist in the relationships between Crowns and police in different jurisdictions.

For instance, generally the role of the Crown at the pre-charge stage is advisory in nature, and not directive. In some jurisdictions, however, police require pre-charge approval from the Crown. Even in jurisdictions where Crown pre-charge approval is not required, there may, by necessity, be Crown involvement prior to the charge being laid. One example would be a case involving wiretaps. In *Regan v. The Queen* (2002), 161 C.C.C. (3d) 97, the Supreme Court of Canada accepted the necessity of pre-charge involvement in certain circumstances. The Court concluded that objectivity is not necessarily compromised by pre-charge involvement. However, a distinction should be drawn between pre-charge advice and advising the police on the grounds to lay a charge. It is in this latter situation that the spectre of tunnel vision usually arises.

With the possible exception of mega-cases,[118] it is recommended that all jurisdictions consider adopting a "best practice" of having a different Crown Attorney prosecute the case than the Crown Attorney who provided the charging advice. This recommendation, however, must take into account the realities of some prosecution services, where there may be a single prosecutor for a large geographic area. In some communities there may be only one Crown Attorney who handles many "routine" matters and is the sole contact with the local police. This can lead to close identification between the Crown and police, and hence a reluctance to disagree. In such situations, second opinions and supervision by senior/regional Crown counsel should always be available. There should be clear identification of the roles and accountabilities within the prosecution service, including the hierarchy of responsibility. In jurisdictions without pre-charge screening, it is further recommended that there be a speedy review of the charge so as to identify any problems at an early stage.

Consultations or case reviews may occur before, during, or after a prosecution. While these consultations may not be appropriate for every case, or even for every serious case, they can be used in situations where counsel are facing difficult, unique or unusual circumstances. Counsel with carriage of the case should be encouraged to review the case with other senior counsel to discuss legal, practical and advocacy strategies. Often cases require a method of problem solving and this case consultation mechanism can be used either as a preventative measure while the case is ongoing, or as a lessons learned session after the case is over. This consultation process is used by other professional groups, such as doctors, and is recognized as an effective tool.

After a charge is laid, the Crown has independent control over the charge and has the sole authority to proceed with the prosecution or withdraw the charge. Early consultation between prosecutors and police should be encouraged. It is important that police training emphasize this separate function of the Crown, so that in appropriate cases, the Crown Attorney may feel unhindered in deciding not to proceed any further with a charge. It is easy to envision situations where fear of criticism or unfavourable comparisons with other prosecutors could hamper the Crown Attorney from discharging his or her duties. This emphasis upon the separate function of Crowns and police also encourages Crowns to be open to theories that may be different from those initially put forward by the investigator. Crown counsel must always act as a challenge function to police officers and must bring critical eyes to bear on the evidence presented to them. They must always be prepared to consider alternate theories and explanations for such things as post-arrest conduct. While prosecutors and police officers must work together closely and co-operatively, the different responsibilities and the different standards they must apply should not be impaired.

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[118] Mega-cases raise unique issues and may need to be exempt from this approach. Care must still be taken to avoid tunnel vision in such cases.

A Crown Attorney must also be wary of decisions being influenced by media coverage or by negative responses by victims. The role of the Crown is often misunderstood by victims and the general public. The Crown Attorney's role as a quasi-judicial officer includes a duty to both the accused and the Court. It is therefore incumbent upon the Crown to foster respect for both the Court and the rights of the accused. Even when the role of the Crown is understood, decisions based upon sound legal analysis may be unpopular. It is therefore important that the workplace culture of prosecutors emphasize the role of the Crown Attorney, and that there be policies in place that support that role. Prosecutors must be wary of being caught up in the enthusiasm of the investigators. Workplace environments should encourage questions and consultations between individual Crown Attorneys. An openness to alternate views, including those held by defence counsel, is reflective of the independence of the Crown Attorney.

VI. SUMMARY OF RECOMMENDATIONS

The following practices should be considered to assist in deterring tunnel vision:

1. **Crown policies on the role of the Crown should emphasize the quasi-judicial role of the prosecution and the danger of adopting the views and/or enthusiasm of others. Policies should also stress that Crowns should remain open to alternate theories put forward by defence counsel and other parties.**

2. **All jurisdictions should consider adopting a "best practice," where feasible given geographic realities, of having a different Crown Attorney prosecute the case than the Crown Attorney who advised that there were grounds to lay the charge. Different considerations might apply with mega-cases.**

3. **In jurisdictions without pre-charge screening, charges should be scrutinized by Crowns as soon as practicable.**

4. **Second opinions and case review should be available in all areas.**

5. **There should be internal checks and balances through supervision by senior staff in all areas with roles and accountabilities clearly defined and a lead Crown on a particular case clearly identified.**

6. **Crown offices should encourage a workplace culture that does not discourage questions, consultations, and consideration of a defence perspective by Crown Attorneys.**

7. **Crowns and police should respect their mutual independence, while fostering cooperation and early consultation to ensure their common goal of achieving justice.**

8. **Regular training for Crowns and police on the dangers and prevention of tunnel vision**

should be implemented. Training for Crown Attorneys should include a component dealing with the role of the police, and training for police should include a component dealing with the role of the Crown.

Critical to the success of any of these recommendations is the provision of resources to allow Crown Attorneys and police to fulfill their roles. Financial, as well as non-financial resources, will be necessary to encourage changes in organizational attitudes, practices and culture.

Above all it must be remembered that tunnel vision is not unique to a particular situation, province or indeed country.[119] As stated by Justice Cory in the *Sophonow Inquiry*, "tunnel vision is insidious."[120] It can thrive in any environment and thus there must be constant vigilance.

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[119] See, for example, discussion and reports in the United Kingdom relating to "The Guilford Four" and "The Birmingham Six" and in Australia to the Chamberlain case.

[120] *Sophonow Inquiry*, p. 37.

CHAPTER 5 - EYEWITNESS IDENTIFICATION AND TESTIMONY

I. INTRODUCTION

There is no denying the powerful impact at trial of a witness for the prosecution stating with confidence and conviction that the accused was the person observed committing the crime. However, experience has shown that erroneous and mistaken identifications have and do occur, resulting in the wrongful conviction of the factually innocent. The most well meaning, honest and genuine eyewitness can, and has been, wrong.[121]

Consider the case of Jennifer Thompson, a North Carolina woman who was raped at knifepoint as a 22-year-old college student:[122]

> During my ordeal, some of my determination took an urgent new direction. I studied every single detail on the rapist's face. I looked at his hairline; I looked for scars, for tattoos, for anything that would help me identify him. When and if I survived the attack, I was going to make sure that he was put in prison and he was going to rot.
>
> When I went to the police department later that day, I worked on a composite sketch to the very best of my ability. I looked through hundreds of noses and eyes and eyebrows and hairlines and nostrils and lips. Several days later, looking at a series of police photos, I identified my attacker. I knew this was the man. I was completely confident. I was sure.
>
> I picked the same man in a lineup. Again, I was sure. I knew it. I had picked the right guy, and he was going to go to jail. If there was the possibility of a death sentence, I wanted him to die. I wanted to flip the switch.
>
> When the case went to trial, I stood up on the stand, put my hand on the Bible and swore to tell the truth. Based on my testimony, Ronald Cotton was sentenced to prison for life. It was the happiest day of my life because I could begin to put it all behind me.

Eleven years later, DNA testing proved Cotton had not been the rapist. Another man later pleaded guilty. The Innocence Project in New York City reports that in the first 130 post-conviction exonerations based on new DNA evidence, 101 (78 per cent) involved mistaken identification, by far the leading factor.[123] The danger associated with eyewitness in-court identification is that it is deceptively credible, largely because it is honest and sincere.[124] If the means used to obtain evidence of identification involve any acts that might reasonably prejudice the accused, the resulting contamination will be virtually impossible to cleanse and the value of the evidence may be partially or wholly destroyed.[125]

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[121] The case of Adolph Beck, from England, is one of the most notorious cases of misidentification. Twice convicted of fraud in 1896 and 1904, based on the testimony of no less then ten witnesses who positively identified him as the perpetrator, he was jailed, only to be subsequently pardoned when the true offender was located.

[122] 'I was Certain, but I Was Wrong,' *New York Times*, June 18, 2000.

The positive identification of an accused is an essential element of any offence. It is a fundamental part of the criminal process. Properly obtained, preserved and presented, eyewitness testimony directly linking the accused to the commission of the offence, is likely the most significant evidence of the prosecution.

Courts have acknowledged the frailties of eyewitness identifications and a significant body of legal decisions and opinions has been generated over the years. The recent commissions of inquiry have determined that misidentification by eyewitnesses has been the foundation for miscarriages of justice. Furthermore, the way that eyewitness identifications are gathered are factors that affect the validity of that evidence. This chapter sets out practical suggestions, guidelines and recommendations for police agencies and prosecutors:

(1) to serve as safeguards to preserve the integrity, quality and reliability of identification evidence;
(2) to reinforce the notion that prosecutions based on eyewitness identification can be undertaken with confidence; and
(3) to reinforce and preserve credibility in the investigation and trial process, while ensuring and maintaining the fairness of the proceedings.

II. CANADIAN COMMISSIONS OF INQUIRY

a) The Commission on Proceedings Involving Guy Paul Morin

> **Recommendation 101 - Police protocols for interviewing to enhance reliability**
>
> The Ministry of the Solicitor General should establish province-wide written protocols for the interviewing of suspects and witnesses by police officers. These protocols should be designed to enhance the reliability of the product of the interview process and to accurately preserve the contents of the interview.

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[123] *Actual Innocence*, p. 365.

[124] *R. v. Hibbert* (2002), 163 C.C.C. (3d) 129 (S.C.C.).

[125] *Rex v. Smierciak* (1946), 87 C.C.C. 175 (Ont. C.A.) at 177; *R. v. Miaponoose* (1996), 110 C.C.C. (3d) 445 (Ont. C.A.).

Recommendation 102 - Training respecting interviewing protocols

All Ontario investigators should be fully trained as to the techniques which enhance the reliability of witness statements and as to the techniques which detract from their reliability. This training should draw upon the lessons learned at this Inquiry. Financial and other resources must be provided to ensure that such training takes place.

Recommendation 103 - Prevention of contamination of witnesses through information conveyed

Police officers should be specifically instructed on the dangers of unnecessarily communicating information (known to them) to a witness, where such information may colour that witness' account of events.

Recommendation 104 - Prevention of contamination of witnesses through commentary on case or accused

Police officers should be specifically instructed on the dangers of communicating their assessment of the strength of the case against a suspect or accused, their opinion of the accused's character, or analogous comments to a witness, which may colour that witness' account of events.

Recommendation 106 - Crown education respecting interviewing practices

The Ministry of the Attorney General should establish educational programming to better train Crown counsel about interviewing techniques on their part which enhance, rather than detract, from reliability. The Ministry may also reflect some of the desirable and undesirable practices in its Crown policy manual.

Recommendation 107 - Conduct of Crown interviews

(a) Counsel should generally not discuss evidence with witnesses collectively.
(b) A witness' memory should be exhausted, through questioning and through, for example, the use of the witness' own statements or notes, before any reference is made (if at all) to conflicting evidence.
(c) The witness' recollection should be recorded by counsel in writing. It is sometimes advisable that the interview be

conducted in the presence of an officer or other person, depending on the circumstances.

(d) Questioning of the witness should be non-suggestive.

(e) Counsel may then choose to alert the witness to conflicting evidence and invite comment.

(f) In doing so, counsel should be mindful of the dangers associated with this practice.

(g) It is wise to advise the witness that it is his or her own evidence that is desired, that the witness is not simply to adopt the conflicting evidence in preference to the witness' own honest and independent recollection and that he or she is, of course, free to reject the other evidence. This is no less true if several other witnesses have given conflicting evidence.

(h) Under no circumstances should counsel tell the witness that he or she is wrong.

(i) Where the witness changes his or her anticipated evidence, the new evidence should be recorded in writing.

(j) Where a witness is patently impressionable or highly suggestible, counsel may be well advised not to put conflicting evidence to the witness, in the exercise of discretion.

(k) Facts which are obviously uncontested or uncontestable may be approached in another way. This accords with common sense.

b) The Inquiry Regarding Thomas Sophonow

Eyewitness Identification

Live line-up

- The third officer who is present with the prospective eyewitness should have no knowledge of the case or whether the suspect is contained in the line-up.

- The officer in the room should advise the witness that he does not know if the suspect is in the line-up or, if he is, who he is. The officer should emphasize to the witness that the suspect may not be in the line-up.

- All proceedings in the witness room while the line-up is being watched should be recorded, preferably by videotape but, if not, by audiotape.

- All statements of the witness on reviewing the line-up must be both noted and recorded verbatim and signed by the witness.

- When the line-up is completed, the witness should be escorted from the police premises. This will eliminate any possibility of contamination of that witness by other officers, particularly those involved in the investigation of the crime itself.

- The fillers in the line-up should match as closely as possible the descriptions given by the eyewitnesses at the time of the event. It is only if that is impossible, that the fillers should resemble the suspect as closely as possible.

- At the conclusion of the line-up, if there has been any identification, there should be a question posed to the witness as to the degree of certainty of identification. The question and answer must be both noted and recorded verbatim and signed by the witness. It is important to have this report on record before there is any possibility of contamination or reinforcement of the witness.

- The line-up should contain a minimum of 10 persons. The greater the number of persons in the line-up, the less likelihood there is of a wrong identification.

Photo pack line-up

- The photo pack should contain at least 10 subjects.

- The photos should resemble as closely as possible the eyewitnesses' description. If that is not possible, the photos should be as close as possible to the suspect.

- Everything should be recorded on video or audiotape from the time that the officer meets the witness, before the photographs are shown through until the completion of the interview. Once again, it is essential that an officer who does not know who the suspect is and who is not involved in the investigation conducts the photo pack line-up.

- Before the showing of the photo pack, the officer conducting the line-up should confirm that he does not know who the suspect is or whether his photo is contained in the line-up. In addition, before showing the photo pack to a witness, the officer should advise the witness that it is just as important to clear the innocent as it is to identify the suspect. The photo pack should be presented by the officer to each witness separately.

- The photo pack must be presented sequentially and not as a package.

- In addition to the videotape, if possible, or, as a minimum alternative, the audiotape, there should be a form provided for setting out in writing and for signature the comments of both the officer conducting the line-up and the witness. All comments of each witness must be noted and recorded verbatim and signed by the witness.

- Police officers should not speak to eyewitnesses after the line-ups regarding their identification or their inability to identify anyone. This can only cast suspicion on any identification made and raise concerns that it was reinforced.

- It was suggested that, because of the importance of eyewitness evidence and the high risk of contaminating it, a police force other than the one conducting the investigation of the crime should conduct the interviews and the line-ups with the eyewitnesses. Ideal as that procedure might be, I think that it would unduly complicate the investigation, add to its cost and increase the time required. At some point, there must be reasonable degree of trust placed in the police. The interviews of eyewitnesses and the line-up may be conducted by the same force as that investigating the crime, provided that the officers dealing with the eyewitnesses are not involved in the investigation of the crime and do not know the suspect or whether his photo forms part of the line-up. If this were done and the other recommendations complied with, that would provide adequate protection of the process.

Trial instructions

- There must be strong and clear directions given by the trial judge to the jury emphasizing the frailties of eyewitness identification. The jury should as well be instructed that the apparent confidence of a witness as to his or her identification is not a criteria of the accuracy of the identification. (In this case, the evidence of Mr. Janower provides a classic example of misplaced but absolute confidence that Thomas Sophonow was the man whom he saw at the donut shop.)

- The trial judge should stress that tragedies have occurred as a result of mistakes made by honest, right-thinking eyewitnesses. It should be explained that the vast majority of the wrongful convictions of innocent persons have arisen as a result of faulty eyewitness identification. These instructions should be given in addition to the standard direction regarding the difficulties inherent in eyewitness identification.

- Further, I would recommend that judges consider favourably and readily admit properly qualified expert evidence pertaining to eyewitness identification. This is certainly not junk science. Careful studies have been made with regard to memory and its effect upon eyewitness identification. Jurors would benefit from the studies and learning of experts in this field. Meticulous studies of human memory and eyewitness identification have been conducted. The empirical evidence has been compiled. The tragic consequences of mistaken eyewitness identification in cases have been chronicled and jurors and trial judges should have the benefit of expert evidence on this important subject. The expert witness can explain the process of memory and its frailties and dispel myths, such as that which assesses the accuracy of identification by the certainty of a witness. The testimony of an expert in this field would be helpful to the triers of fact and assist in providing a fair trial.

- The trial judge must instruct and caution the jury with regard to an identification which has apparently progressed from tentative to certain and to consider what may have brought about that change.

- During the instructions, the trial judge should advise the jury that mistaken eyewitness identification has been a significant factor in wrongful convictions of accused in the United States and in Canada, with a possible reference to the Thomas Sophonow case.

III. MACFARLANE PAPER

In his paper, Bruce MacFarlane Q.C., notes that eyewitness misidentification is "the single most important factor leading to wrongful convictions."[126] After reviewing the problems and dangers inherent with this evidence and the potential for tainting at the investigation stage, MacFarlane formulated six core rules to reduce the risk of an eyewitness contributing to the conviction of someone who is factually innocent:[127]

> An officer who is independent of the investigation should be in charge of the lineup or photospread. The officer should not know who the suspect is – avoiding the possibility of inadvertent hints or reactions that could lead the witness before the identification takes place, or increase the witness' degree of confidence afterward.
>
> The witness should be advised that the actual perpetrator may not be in the lineup or photospread, and therefore they should not feel that they must make an identification. They should also be told that the person administering the lineup does not know which person is the suspect in the case.
>
> The suspect should not stand out in the lineup or photospread as being different from the others, based on the eyewitness' previous description of the perpetrator, or based on other factors that would draw extra attention to the suspect.
>
> A clear statement should be taken from the eyewitness at the time of the identification, and prior to any possible feedback, as to his or her confidence that the identified person is the actual culprit.
>
> On completion of the identification process, the witness should be escorted from the police premises to avoid contamination of the witness by other officers, particularly those involved in the investigation in question.
>
> Show-ups should be used only in rare circumstances, such as when the suspect is apprehended near the crime scene shortly after the event.

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[126] p. 47.

[127] pp. 80-81.

> There are two further steps that may be helpful. They should be done wherever reasonably practicable:
>
> (1) The identification process, whether by lineup, photograph or composite, should be recorded throughout, preferably by videotape but, if not, by audiotape.
>
> (2) A photospread should be provided sequentially and not as a package, thus preventing "relative judgments."
>
> These reforms do not require new legislation, nor are they particularly resource-intensive. They can be accomplished through policy changes by local authorities as part of a strategy to fight crime and ensure that justice is truly done.

IV. CASE LAW

Courts have long recognized the frailties of identification evidence given by independent, honest and well-meaning eyewitnesses.[128]

The Supreme Court of Canada has stated:[129]

> The cases are replete with warnings about the casual acceptance of identification evidence even when such identification is made by direct visual confrontation of the accused. By reason of the many instances in which identification has proved erroneous, the trier of fact must be cognizant of the inherent frailties of identification evidence arising from the psychological fact of the unreliability of human observation and recollection.

When the prosecution's case depends substantially upon the accuracy of eyewitness identification, a trial judge is required to specifically instruct the jury on the need for caution when dealing with such evidence,[130] given the documented unreliability of such identification. The charge must not only deal with issues of credibility, but also with the inherent frailties of identification evidence because of the unreliability of human observation and recollection.[131] The trial judge should also instruct the jury about the various factors that can affect the reliability of eyewitness identification evidence and remind the jury that mistaken identification has been responsible for miscarriages of justice by reason of the wrongful conviction of persons who have been mistakenly identified by one or more honest witnesses.[132]

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[128] *R. v. Nikolovski* (1996), 111 C.C.C. (3d) 403 (S.C.C.) at 412.

[129] *Burke v. The Queen* (1996), 105 C.C.C. (3d) 205 (S.C.C.) at 224.

[130] See also B*ardales v. The Queen*, [1996] 2 S.C.R. 461; *R. v. Fengstad* (1994), 27 C.R. (4th) 383 (B.C.C.A.); *R. v. Sophonow* (no. 2) (1986), 25 C.C.C. (3d) 415 (Man. C.A.); *R. v. Wristen* (1999), 47 O.R. (3d) 66 (C.A.) at para. 32.

[131] *R. v. Sutton*, [1970] 2 O.R. 358, [1970] 3 C.C.C. 152 (C.A.); *R. v. Miaponoose* (1996), 30 O.R. (3d) 419, 110 C.C.C. (3d) 445 (C.A.); *R. v. Mezzo*, [1986] 1 S.C.R. 802, 27 C.C.C. (3d) 97; *R. v. Turnbull*, [1976] 3 All E.R. 549, 63 Cr. App. R. 132 (C.A.).

It is clear that an accused can be convicted on uncorroborated eyewitness identification evidence.[133] In fact, despite all the potential dangers, an accused may be found guilty on the basis of the testimony of a single eyewitness.[134] A first time in-dock identification, though admissible,[135] has little weight and has particular frailties over and above the normal frailties associated with identification evidence. It is therefore considered undesirable and unsatisfactory.[136] A specific warning should be given to a jury when considering the impact of this form of evidence.[137] If an eyewitness's evidence becomes stronger with the passage of time as the matter proceeds through the court, this may imply that the identification is in fact "post-event reconstruction," which undermines its reliability.[138]

Regardless of the number of similar characteristics an eyewitness testifies about a particular accused, if there is one dissimilar feature, there is no identification without other sources of confirming evidence.[139] A minor error about one feature of the accused's appearance, however, may not rob the identification evidence of all weight.[140] Weak identification evidence may be enhanced by other circumstantial evidence so as to render a verdict reasonable.[141]

Improprieties in police procedures do not necessarily destroy the identification evidence or render it inadmissible.[142] Where the police use improper procedures in obtaining identification evidence, the evidence can be left with the jury. But the trial judge should caution the jury on the circumstances in which the identification evidence was obtained.[143]

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[132] *R. v. Sutton, infra.*

[133] *R. v. Lussier* (1980) , 57 C.C.C. (2d) 536 at page 538 (Ont. C.A.).

[134] *R. v. Nikolovski* (1996), 111 C.C.C. (3d) 403 (S.C.C.); *R. v. Hutton* (1980), 43 N.S.R. (2d) 541 (N.S.C.A.).

[135] *R. v. Hibbert* (2002) 163 C.C.C. (3d) 129 (S.C.C.).

[136] *R. v. Izzard* (1990), 54 C.C.C. (3d) 252 (Ont. C.A.).

[137] *R. v. Tebo* (2003), 175 C.C.C. (3d) 116 (Ont. C.A.); *R. v. Walsh,* [1997] O.J. No. 149 (C.A.).

[138] *R. v. Lussier*, [1998] B.C.J. No. 2678 (C.A.).

[139] *Chartier v. A.G. Quebec* (1979) 48 C.C.C. (2d) 34 (S.C.C.); *R. v. Tomasetti* [2002] M.J. No. 486 (C.A.).

[140] *R. v. Malone* (1984), 11 C.C.C. (3d) 34 (Ont. C.A.).

[141] *R. v. Robinson*, [1998] O.J. No. 2081 (C.A.).

[142] *R. v. Mezzo infra.*

[143] *R. v. D'Amico* (1993), 16 O.R. (3d) 125 (C.A.) at 129; see also *R. v. Miaponoose* (1996), 110 C.C.C. (3d) 445 (Ont. C.A.).

It is perfectly permissible and helpful to the trier of fact to lead evidence of descriptions given by witnesses to police officers shortly after the crime. Such evidence is an exception to the common law rule prohibiting prior consistent statements.[144] In *R. v. Tat,*[145] the Ontario Court of Appeal set out two preconditions for the use of a previously-recorded description:

- Prior statements that identify or describe the accused may be admitted where the witness identifies the accused at trial, so that the trier of fact may make an informed assessment of the probative value of the purported identification.

- Prior out-of-court identification may also be admitted where the identifying witness is unable to identify the accused at trial, but can testify that he or she previously gave an accurate description or made an identification. Where the witness testifies that he or she previously identified the perpetrator, evidence of out-of-court statements is admissible, as original evidence to show whom it was that the witness identified.[146]

Consideration should also be given to the use of a *K.G.B.* application in the appropriate circumstances if a witness is refusing or unable to cooperate in accordance with a previous statement.

The admissibility and relevance of expert evidence in the area of eyewitness misidentification remains a thorny issue. Despite calls from commissions of inquiry for greater use of this type of opinion evidence,[147] judges continue to resist the introduction of an expert in an area that is, in reality, in the realm of the knowledge of the trier of fact.

The guiding principles respecting the admission of expert evidence are found in the Supreme Court of Canada decision of *R. v. Mohan.*[148] In that case, the admission of expert evidence depended on the application of the following criteria:

(1) relevance;
(2) necessity in assisting the trier of fact;
(3) absence of any exclusionary rule; and
(4) a properly qualified expert.

Expert evidence is admissible if exceptional issues require special knowledge outside the experience of the trier of fact. It has been held that expert evidence in the area of eyewitness identification is not of a special nature outside of the jury's knowledge, but rather a reaffirmation of their normal experiences. The jury does not need the expert's testimony to do its job - a proper charge and caution can best deal with the inherent dangers of identification evidence.[149]

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[144] *R. v. Langille* (1990), 59 C.C.C. (3d) 544 (Ont. C.A.).

[145] (1997), 117 C.C.C. (3d) 481 (Ont. C.A.).

[146] *Ibid.*, at 498-99; see also *R. v. Starr* (2000), 147 C.C.C. (3d) 449 (S.C.C.).

[147] See *Sophonow Inquiry.*

[148] [1994] 2 S.C.R. 9.

A trial judge or a jury may use a videotape to make their own assessment of whether the person shown on tape is the accused. They are also entitled to use any identification they have made in this way as the sole basis for conviction, though the judge is required to instruct the jury to exercise caution in attempting to identify an accused person from a videotape.[150] It is not necessary or relevant for police officers to give their own non-expert opinion about who is shown in the videotape, as the trier of fact can make their own evaluation and arrive at their own conclusion.[151]

V. SUGGESTED PRACTICES AND RECOMMENDATIONS

It is clear from the case law and the inquiry recommendations that the honesty and sincerity of the eyewitness is not determinative of the quality of the identification. Rather, there must be due and detailed scrutiny to determine whether it is reliable. These indicia of reliability include, but are not limited to:

- Was the suspect a complete stranger or known to the witness?
- Was the opportunity to see the suspect a fleeting glimpse or something more substantial?
- What were the lighting and other physical conditions at the time of observation?
- Was the description reduced to writing or reported in detail in a timely fashion?
- Is the description general and vague or descriptive in detail including distinctive features of the suspect and their clothing?
- Was there a potential tainting or contamination of the identification?
- Has the witness described a distinguishing feature of the suspect or failed to mention a distinguishing feature?
- Has the eyewitness identification been confirmed in some particular?

Proper interview techniques and procedures by police and prosecutors are essential to ensure the reliability of identification evidence and minimize and eliminate the potential contamination.

The six core rules set out by Bruce MacFarlane represent a good starting point for reasonable standards of practice that should be implemented and integrated by all police agencies. Collectively, the purpose of the core rules is to minimize the possibility of contamination of the identification evidence, however inadvertent, by outside influences. However, these guidelines must be designed in a manner that takes into account for the realities of day-to-day police investigations, having regard to the impact they will have on resources and manpower. Accordingly, it is proposed that the core rules be qualified as follows:

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[149] *R. v. McIntosh* (1997), 117 C.C.C. (3d) 385 (Ont. C.A.); *R. v. Maragh,* [2003] O.J. No. 3575 (S.C.J.); *R. v. D.D. (2000), 148 C.C.C. (3d) 41 (S.C.C.).* But note, in the decision of *R. v. Miaponoose* (1996), 110 C.C.C. (3d) 445 (Ont. C.A.), the Ontario Court of Appeal appeared to suggest that expert evidence might be appropriate where the Crown's case is based on a single eyewitness to the event, so this issue remains a live one.

[150] *R. v. Nikolovski* (1996), 111 C.C.C. (3d) 403 (S.C.C.).

[151] *R. v. Cuming* (2001) 158 C.C.C. (3d) 433 (Ont. C. A.).

1) If possible, an officer who is independent of the investigation should be in charge of the lineup or photospread. This officer should not know who the suspect is – avoiding the possibility of inadvertent hints or reactions that could lead the witness before the identification takes place, or increase the witness's degree of confidence afterward.

2) The witness should be advised that the actual perpetrator may not be in the lineup or photospread, and therefore they should not feel that they must make an identification.

3) The suspect should not stand out in the lineup or photospread as being different from the others, based on the eyewitness' previous description of the perpetrator, or based on other factors that would draw extra attention to the suspect.

4) All of the witness's comments and statements made during the lineup or photospread viewing should be recorded verbatim, either in writing or if feasible and practical, by audio or videotaping.

5) If the identification process occurs on police premises, reasonable steps should be taken to remove the witness on completion of the lineup to prevent any potential feedback by other officers involved in the investigation and cross-contamination by contact with other witnesses.

6) Show-ups[152] should be used only in rare circumstances, such as when the suspect is apprehended near the crime scene shortly after the event.

7) A photospread should be provided sequentially, and not as a package, thus preventing 'relative judgments.'

Ten police agencies from across the country were contacted to determine their current practices and policies with respect to lineups and photospreads. Presently, four agencies use sequential photospreads, while four others are studying proposals to incorporate this practice. Five agencies use one-sheet photospreads, while the remainder use between 8 and 12 individual photographs. Three of the agencies require officers not involved in the investigation to conduct the photospread with the eyewitness. All agencies use filler photographs that mirror the suspect's attributes. None of the agencies condone discussions about the witness's choice. All the agencies require the witness's comments to be recorded, while two departments prefer the use of videotaping.

These rules represent best practices that should be adopted by police investigators. Through the elimination of all suggestions or suspicions of a potential contamination, the integrity of the investigators and confidence in the investigation will be significantly enhanced.

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[152] A 'show-up' is the act of presenting a solitary suspect in person to the witness, at some point in the pre-trial investigation, for identification - for example, inviting a witness to attend a court hearing where the accused is appearing in person and then asking if the witness recognizes the individual.

Concerns have also been raised about the potential for media interference in the investigation process. Despite the best of intentions, the media's virtually unlimited access to information has created an enormous problem and challenge for policing. Reporters interview witnesses before investigators are involved; images and names of suspects, together with specific details of crimes under investigation, are routinely published and broadcast. The potential for the tainting of identification evidence is significant. While the role of the media is outside of the mandate of this Working Group, the importance of getting a witness's version of events as early and as completely in the investigation before the impact of media contamination cannot be stressed enough.

The possibility of contamination and misuse can also arise at the prosecution stage as well. For prosecutors, the following practical suggestions should be considered:

- Assume the identity of the accused is always at issue unless the defence specifically admits it on the record. Timely preparation and a critical review of all of the available identification evidence, including the manner in which it was obtained, is required as it will affect the conduct and quality of the trial.

- Allow the witness a reasonable opportunity to review all previously given statements and confirm that the statements were accurate and a true reflection of their observations at the time. Carefully canvass the full range of the indicia of the identification, including any distinguishing features that augment this evidence. Remember that it is the collective impact of all of the evidence that will be considered in support of a conviction. Defects in one witness's identification can be overcome by the consideration of other evidence.

- Never interview witnesses collectively. Never prompt or coach a witness by offering clues or hints about the identity of the accused in court. Do not condone or participate in a "show-up" lineup. Never show a witness an isolated photograph or image of an accused during the interview.

- When meeting with witnesses in serious cases, it is wise, if it is feasible and practical, to have a third party present to ensure there is no later disagreement about what took place at the meeting.

- Never tell a witness that they are right or wrong in their identification.

- Remember that disclosure is a continuing obligation. All inculpatory and exculpatory evidence must be disclosed to the defence in a timely fashion. In the event that a witness materially changes their original statement, by offering more or recanting previously given information during an interview, the defence must be told. In these circumstances, it would be prudent to enlist the services of a police officer to record a further statement in writing setting out these material changes.

- Always lead evidence of the history of the identification. It is vitally important that the trier of fact not only be told of the identification but all the circumstances involved in obtaining it, i.e. the composition of photospread.

- Be wary of prosecutions based on weak single-witness identification. While not required by law to secure a conviction, ascertain whether there is any corroboration of an eyewitness's identification in order to overcome any deficiencies in the quality of that evidence.

As can be seen, proper interview techniques are important skills to be used by both police and prosecutors. Knowing what questions to ask, what information is sought, and most importantly how to ask the questions, are the essential elements to ensure that the potential evidence is free from contamination. It is therefore recommended that workshops on proper interviewing techniques be part of regular and ongoing training sessions for police and prosecutors to enhance the reliability and accuracy of the evidence-gathering and tendering process.

The tendering of expert evidence on the frailties of eyewitness identification at trial is not recommended. It is redundant and usurps the function and role of the trier of fact. This is not information that is outside the regular knowledge of the jury and has the potential to distort the fact-finding process. The dangers inherent in eyewitness identification are well-documented and can be best dealt with by a proper caution by the court. However, police and prosecutors would benefit from this expertise to highlight and better appreciate the perils of eyewitness misidentifications. Therefore it is recommended that these presentations be incorporated in regular and on-going training sessions.

Procedural fairness is the cornerstone of the legal process. If due diligence is employed in gathering, cataloguing and presenting eyewitness identification, while acknowledging the inherent frailties associated with it, the likelihood of miscarriages of justice will be significantly reduced.

VI. SUMMARY OF RECOMMENDATIONS

1. **The following are reasonable standards and practices that should be implemented and integrated by all police agencies:**

   a) **If possible, an officer who is independent of the investigation should be in charge of the lineup or photospread. This officer should not know who the suspect is – avoiding the possibility of inadvertent hints or reactions that could lead the witness before the identification takes place, or increase the witness's degree of confidence afterward.**

   b) **The witness should be advised that the actual perpetrator may not be in the lineup or photospread, and therefore the witness should not feel that they must make an identification.**

c) The suspect should not stand out in the lineup or photospread as being different from the others, based on the eyewitness's previous description of the perpetrator, or based on other factors that would draw extra attention to the suspect.

d) All of the witness's comments and statements made during the lineup or photospread viewing should be recorded verbatim, either in writing or if feasible and practical, by audio or videotaping.

e) If the identification process occurs on police premises, reasonable steps should be taken to remove the witness on completion of the lineup to prevent any potential feedback by other officers involved in the investigation and cross contamination by contact with other witnesses.

f) Show-ups should be used only in rare circumstances, such as when the suspect is apprehended near the crime scene shortly after the event.

g) A photospread should be provided sequentially, and not as a package, thus preventing 'relative judgments.'

2. For prosecutors, the following practical suggestions should be considered:

a) Assume the identity of the accused is always at issue unless the defence specifically admits it on the record. Timely preparation and a critical review of all of the available identification evidence, including the manner in which it was obtained, is required as it will affect the conduct and quality of the trial.

b) Allow the witness a reasonable opportunity to review all previously given statements and confirm that the statements were accurate and a true reflection of their observations at the time. Carefully canvass the full range of the indicia of the identification, including any distinguishing features that augment this evidence. Remember that it is the collective impact of all of the evidence that will be considered in support of a conviction. Defects in one witness's identification can be overcome by the consideration of other evidence.

c) Never interview witnesses collectively. Never prompt or coach a witness by offering clues or hints about the identity of the accused in court. Do not condone or participate in a "show-up" lineup. Never show a witness an isolated photograph or image of an accused during the interview.

d) When meeting with witnesses in serious cases, it is wise, if it is feasible and practical, to have a third party present to ensure there is no later disagreement about what took place at the meeting.

e) Never tell a witness that they are right or wrong in their identification.

f) Remember that disclosure is a continuing obligation. All inculpatory and exculpatory evidence must be disclosed to the defence in a timely fashion. In the

event that a witness materially changes their original statement, by offering more or recanting previously given information during an interview, the defence must be told. In these circumstances, it would be prudent to enlist the services of a police officer to record a further statement in writing setting out these material changes.

g) **Always lead evidence of the history of the identification. It is vitally important that the trier of fact not only be told of the identification but all the circumstances involved in obtaining it, i.e. the composition of photospread.**

h) **Be wary of prosecutions based on weak single-witness identification. While not required by law to secure a conviction, ascertain whether there is any corroboration of an eyewitness's identification in order to overcome any deficiencies in the quality of that evidence.**

3. **The use of expert evidence on the frailties of eyewitness identification is redundant and unnecessary in the fact-finding process. A proper charge and caution by the trial judge can best deal with the inherent dangers of identification evidence.**

4. **Workshops on proper interviewing should be incorporated in regular and ongoing training sessions for police and prosecutors.**

5. **Presentations on the perils of eyewitness misidentifications should be incorporated in regular and ongoing training sessions for police and prosecutors.**

CHAPTER 6 - FALSE CONFESSIONS

I. INTRODUCTION

Innocent individuals sometimes confess to crimes they have not committed. As noted by Justice Iacobucci, on behalf of five other members of the Supreme Court of Canada, "…it may seem counterintuitive that people would confess to a crime that they did not commit…however, this intuition is not always correct. A large body of literature has developed documenting hundreds of cases where confessions have been proven false by DNA evidence, subsequent confessions by the true perpetrator, and other such independent sources of evidence." [153]

In the opinion of some of the leading American experts in this field:

> For those concerned with the proper administration of justice, the important issue is no longer whether contemporary interrogation methods cause innocent suspects to confess. Nor is it to speculate about the rate of police-induced false confession or the annual number of wrongful convictions they cause. Rather, the important question is: *How can such errors be prevented?* "[154]

The Innocence Project in New York City reports that of the first 130 post-conviction exonerations based on DNA evidence, 35 (27 per cent) involved false confessions.[155] The problem may or may not be as extensive in Canada as it is in the United States; however, it is clear that the Canadian commissions of inquiry have focused on the issue and made recommendations concerning the taking of statements from suspects and witnesses.

This chapter will review the various recommendations regarding police interviews and, in light of the current protections offered by the law, make recommendations as to what steps should be taken by those charged with the enforcement and prosecution of the law to prevent miscarriages of justice occurring in the future.

II. CANADIAN COMMISSIONS OF INQUIRY

The inquiry recommendations essentially fall into two groups: (a) recording the taking of statements, and (b) establishing investigation standards and training police and prosecutors.

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[153] *R. v. Oickle,* [2000] 2 S.C.R. 3 at para. 35.

[154] R.A. Leo and R.J. Ofshe, "The Consequences of False Confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogation" (1998), 88 Crim. L. & Criminology 429 at p. 492.

[155] *Actual Innocence*, p. 365.

Recording the taking of statements

The three commissions of inquiry made a number of recommendations regarding the recording of police interviews of both suspects and witnesses:

a) The Royal Commission into the Donald Marshall, Jr., Prosecution

> **Recommendation 74**
>
> We recommend that in cases where suspects and/or witnesses are juveniles or mentally unstable, investigating officers make special efforts to ensure they are treated fairly. Supportive persons from the witness/suspect viewpoint should be present during the interview.
>
> **Recommendation 75**
>
> We recommend that audio-visual recording of police interviews of chief suspects and witnesses in serious crimes such as murder, and of juveniles and other interviewees who may be easily influenced, be encouraged.

b) The Commission on Proceedings Involving Guy Paul Morin

> **Recommendation 96 - Police videotaping of suspects**
>
> - The Durham Regional Police Service should amend its operational manual to provide that all interviews conducted with suspects within a police station be videotaped or audiotaped, absent truly exigent circumstances. Any practice of interviewing a suspect off-camera before a formal videotaped interview undermines this policy. Similarly, a practice of encouraging suspects to speak off the record or off-camera during an interview undermines this policy. Videotaping or audiotaping ultimately narrows trial issues, shortens trials, protects both the interviewer and interviewee from unfounded allegations and encourages compiiance with the law; such a policy also enables the parties and the triers of fact to evaluate the extent to which the interviewing process enhanced or undermined the reliability of the statement.
>
> - The Durham Regional Police Service should investigate the feasibility of adopting the practice of the Australian Federal Police of carrying tape recorders on duty for use when

interviewing in other locations or indeed, for use when executing search warrants or in analogous situations.

- Where oral statements, which are not videotaped or audiotaped, are allegedly made by a suspect outside of the police station, the alleged statements should then be re-read to the suspect at the police station on videotape and his or her comments recorded. Alternatively, the alleged statement should be contemporaneously recorded in writing and the suspect ultimately permitted to read the statement as recorded and sign it, if it is regarded as accurate.

- Where the policy is not complied with, the police should reflect in writing why the policy was not complied with.

- The Ministry of the Solicitor General should work to implement this policy (in the very least) for all major Ontario police forces.

Recommendation 97 - Exercise of trial judge's discretion

A trial judge may wish to consider on an admissibility voir dire any failure to comply with any policy established pursuant to Recommendation 96 and may wish to instruct a jury (or himself or herself, as the case may be) as to the inference which may be drawn from the failure of the police to comply with such a policy. In doing so, the trial judge (and, where applicable, the jury) should be entitled to consider the explanation, if any, for the failure to comply with the policy.

Recommendation 98 - Police videotaping of designated witnesses

The Durham Regional Police Service should implement a similar policy for interviews conducted of significant witnesses in serious cases where it is reasonably foreseeable that their testimony may be challenged at trial. This policy extends, but is not limited to, unsavoury, highly suggestible or impressionable witnesses whose anticipated evidence may be shaped, advertently or inadvertently, by the interview process. The Ministry of the Solicitor General should assist in implementing this policy (in the very least) for all major Ontario police forces.

c) The Inquiry Regarding Thomas Sophonow

Recommendations (at page 19 of Report)

- The evidence pertaining to statements given by an accused will always be of great importance in a trial. The possibility of errors occurring in manually transcribing a verbal statement by anyone other than a skilled shorthand reporter is great; the possibility of misinterpreting the words of the accused is great; and the possibility of abusive procedures, although slight, exists in those circumstances. That, coupled with the ease with which a tape recording can be made, make it necessary to exclude unrecorded statements of an accused. It is the only sure means of avoiding the admission of inaccurate, misinterpreted and false statements.

- I would recommend that videotaping of interviews with suspects be made a rule and an adequate explanation given before the audiotaping of an interview is accepted as admissible. This is to say, all interviews must be videotaped or, at the very least, audiotaped.

- Further, interviews that are not taped should as general rule, be inadmissible. There is too great a danger in admitting oral statements. They are not verbatim and are subject to misinterpretation and errors, particularly of omission. Their dangers are too many and too serious to permit admission. Tape recorders are sufficiently inexpensive and accessible that they can be provided to all investigating officers and used to record the statements of any suspect.

Investigation Standards and Training of Police and Prosecutors

Without always specifying what they should be, both the *Marshall Inquiry* and the *Morin Inquiry* recommended that police investigation standards/policies/protocols be established. The *Morin Inquiry* and the *Sophonow Inquiry* also recommended that training be provided for police and/or prosecution staff:

The Commission on Proceedings Involving Guy Paul Morin

> **Recommendation 100 - Creation of policies for police note taking and note keeping**
>
> Policies should be established to better regulate the contents of police notebooks and reports. In the least, such policies should reinforce the need for a complete and accurate record of interviews conducted by police, their observations, and their activities.

Recommendation 101 - Police protocols for interviewing to enhance reliability

The Ministry of the Solicitor General should establish province-wide written protocols for the interviewing of suspects and witnesses by police officers. These protocols should be designed to enhance the reliability of the product of the interview process and to accurately preserve the contents of the interview.

Recommendation 102 - Training respecting interviewing protocols

All Ontario investigators should be fully trained as to the techniques which enhance the reliability of witness statements and as to the techniques which detract from their reliability. This training should draw upon the lessons learned at this Inquiry. Financial and other resources must be provided to ensure that such training takes place.

Recommendation 103 - Prevention of contamination of witnesses through information conveyed

Police officers should be specifically instructed on the dangers of unnecessarily communicating information (known to them) to a witness, where such information may colour that witness' account of events.

Recommendation 104 - Prevention of contamination of witnesses through commentary on case or accused

Police officers should be specifically instructed on the dangers of communicating their assessment of the strength of the case against a suspect or accused, their opinion of the accused's character, or analogous comments to a witness, which may colour that witness' account of events.

Recommendation 105 - Interviewing youthful witnesses

Police officers should be specifically instructed how to interview youthful witnesses. Such instructions should include, in the least, that such witnesses should be interviewed, where possible, in the presence of an adult disinterested in the evidence.

Recommendation 106 - Crown education respecting interviewing practices

The Ministry of the Attorney General should establish educational programming to better train Crown counsel about interviewing techniques on their part which enhance, rather than detract, from reliability. The Ministry may also reflect some of the desirable and undesirable practices in its Crown policy manual.

Recommendation 107 - Conduct of Crown interviews

- Counsel should generally not discuss evidence with witnesses collectively.
- A witness' memory should be exhausted, through questioning and through, for example, the use of the witness' own statements or notes, before any reference is made (if at all) to conflicting evidence.
- The witness' recollection should be recorded by counsel in writing. It is sometimes advisable that the interview be conducted in the presence of an officer or other person, depending on the circumstances.
- Questioning of the witness should be non-suggestive.
- Counsel may then choose to alert the witness to conflicting evidence and invite comment.
- In doing so, counsel should be mindful of the dangers associated with this practice.
- It is wise to advise the witness that it is his or her own evidence that is desired, that the witness is not simply to adopt the conflicting evidence in preference to the witness' own honest and independent recollection and that he or she is, of course, free to reject the other evidence. This is no less true if several other witnesses have given conflicting evidence.
- Under no circumstances should counsel tell the witness that he or she is wrong.
- Where the witness changes his or her anticipated evidence, the new evidence should be recorded in writing.
- Where a witness is patently impressionable or highly suggestible, counsel may be well advised not to put conflicting evidence to the witness, in the exercise of discretion.
- Facts which are obviously uncontested or uncontestable may be approached in another way. This accords with common sense.

III. MACFARLANE PAPER

Bruce MacFarlane Q.C. makes the following two policy recommendations related to custodial interrogations: [156]

> **First**, custodial interrogations of a suspect at a police facility in a serious case such as homicide should be videotaped. Videotaping should not be confined to the statement made by the suspect after interrogation, but the entire interrogation process.
>
> **The second** recommendation concerns police training. Investigators need to receive better training about the existence, causes and psychology of police-induced false confessions. There needs to be a much better understanding of how psychological strategies can cause both guilty *and innocent* people to confess. In addition, police need to receive better training about the indicia of reliable and unreliable statements, including narratives that are simply false. Testing the statements against other established case facts will also guard against tunnel vision, and potentially enhance the strength of the case for ultimate presentation to the courts.

IV. CURRENT PROTECTIONS AGAINST FALSE CONFESSIONS

a) Common law confessions rule and Charter protections

Both the common law and the *Charter* provide protection against false confessions.

Common law

At common law, the confessions rule provides that "no statement made out of court by an accused to a person in authority can be admitted into evidence against him unless the prosecution shows, to the satisfaction of the trial judge, that the statement was made freely and voluntarily."[157]

Recently, the Supreme Court of Canada restated the confessions rule in *R. v. Oickle,*[158] explaining that this was required because of, *inter alia,* "our growing understanding of the problem of false confessions."[159] In restating the rule, the Court noted that "[t]he confessions rule should recognize which interrogation techniques commonly produce false confessions so as to avoid miscarriages of justice."[160]

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[156] pp. 85-86.

[157] *Erven* v. *The Queen*, [1979] S.C.R. 926 at 931; *R* v *Hodgson* (1998), 127 C.C.C. (3d) 449 (S.C.C.) at para. 12.

[158] [2000] 2 S.C.R. 3, 147 C.C.C. (3d) 321.

[159] *Ibid.* at para. 32.

[160] *Ibid.* at para. 32.

The Court emphasized that the application of the confessions rule is of necessity contextual. When reviewing the making of a confession to determine whether it was voluntarily made, a trial judge should consider all the relevant factors, which include,

1) **threats or promises (paras. 48-57)**
    - "The most important consideration in all cases is to look for a quid pro quo offer by interrogators, regardless of whether it comes in the form of a threat or a promise."
    - "…obviously imminent threats of torture will render a confession inadmissible."
    - More common are subtle, veiled threats, such as "it would be better to tell." This will often render the confession inadmissible. "However, phrases like 'it would be better if you told the truth' should not automatically require exclusion. Instead, as in all cases, the trial judge must examine the entire context of the confession, and ask whether there is a reasonable doubt that the resulting confession was involuntary."
    - As for promises or inducements, "The classic 'hope of advantage' is the prospect of leniency from the courts. It is improper for a person in authority to suggest that he or she will take steps to procure a reduced charge or sentence if the suspect confesses...An explicit offer by the police to procure lenient treatment for a confession is clearly a very strong inducement, and will warrant exclusion in all but exceptional circumstances."
    - "Another type of inducement…is an offer of psychiatric assistance or counselling for the suspect in exchange for a confession. While this is clearly an inducement, it is not as strong as an offer of leniency and regard must be had to the entirety of the circumstances."
    - Spiritual inducements "…will generally not produce an involuntary confession, for the very simple reason that the inducement offered is not in the control of police officers…as a general rule, confessions which result from spiritual exhortations or appeals to conscience and morality, are admissible in evidence, whether urged by a person in authority or by someone else."

2) **Oppression (paras. 58-62)**
    - Oppressive conditions may produce an involuntary confession. In assessing a confession, the court should consider whether the suspect was: deprived of food, clothing, water, sleep, or medical attention; denied access to counsel; confronted with fabricated evidence; or questioned aggressively for a prolonged period of time.
    - Another possible source of oppressive conditions is the police use of inadmissible or fabricated evidence. Standing alone, this is not a determinative factor, but it is a relevant factor to be considered with other factors.

3) **Operating mind (paras. 63-64)**
    - The operating mind doctrine requires that the accused knows what he is saying and that it may be used to his detriment.
    - Like oppression, the operating mind doctrine is not a discrete inquiry divorced from the rest of the confessions rule, but instead is just one application of the general rule that involuntary confessions are inadmissible.

4) Other police trickery (paras. 65-67)

- This is a distinct inquiry. While related to voluntariness, its more specific objective is maintaining the integrity of the criminal justice system.
- The confession should be excluded where police trickery is so appalling as to shock the community.
- In assessing the level of protection offered by the confessions rule, it should be noted that in the opinion of the Supreme Court, "The common law confessions rule is well-suited to protect against false confessions."[161]

Canadian Charter of Rights and Freedoms

The *Charter* offers protection against false confessions as well. Section 7 of the *Charter* guarantees the right to remain silent and s. 10(b) the right to counsel:

> **Section 7** -- Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.
>
> **Section 10** -- Everyone has the right on arrest or detention -- **(b)** to retain and instruct counsel without delay and to be informed of that right…

Section 7 of the *Charter* gives a detained person the right to choose whether to speak to the authorities or remain silent. In *R v Hebert,*[162] the Supreme Court described that right as follows:

> The essence of the right to remain silent is that the suspect be given a choice; the right is quite simply the freedom to choose – the freedom to speak to authorities on one hand, and the freedom to refuse to make a statement to them on the other. This right of choice comprehends the notion that the suspect has been accorded the right to consult counsel and thus to be informed of the alternatives and their consequences, and that the actions of the authorities have not unfairly frustrated his or her decision on the question of whether to make a statement to the authorities.

Earlier on the Court had noted[163] that,

> The right to choose whether or not to speak to the authorities is defined objectively rather than subjectively. The basic requirement that the suspect possess an operating mind has a subjective

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[161] *Ibid.* at para 47.

[162] [1990] 2 S.C.R. 151, 57 C.C.C. (3d) 1.

[163] *Ibid.* at p. 39.

> element. But this established, the focus under the *Charter* shifts to the conduct of the authorities *vis-à-vis* the suspect. Was the suspect accorded the right to consult counsel? Was there other police conduct which effectively and unfairly deprived the suspect of the right to choose whether to speak to the authorities or not?

Section 10(b) requires that the detainee be advised of their right to counsel and provided with the opportunity to do so without delay. The purpose of the right to counsel is to allow the detainee not only to be informed of his rights and obligations under the law but, equally if not more important, to obtain advice as to how to exercise those rights.[164] One of those rights is the right to remain silent.

In fact, the most important right to be advised of is the right to silence. As noted in *Hebert,*[165]

> The most important function of legal advice upon detention is to ensure that the accused understands his rights, chief among which is the right to silence. The detained suspect, potentially at a disadvantage in relation to the informed and sophisticated powers of the state, is entitled to rectify the disadvantage by speaking to counsel at the outset, so that he is aware of his right not to speak to the police and obtains appropriate advice with respect to the choice he faces.

Thus, the s. 10(b) right to counsel helps to ensure a proper and meaningful exercise of the right to remain silent, which right in turn protects against false confessions.

The s. 10(b) right imposes a number of duties, both informational and implementation, on state authorities. The informational duty is to inform the detainee of his or her right to retain and instruct counsel without delay and of the existence and availability of Legal Aid and duty counsel. The implementational duties are two-fold and arise upon the detainee indicating a desire to exercise his or her right to counsel. The first implementational duty is "to provide the detainee with a reasonable opportunity to exercise the right (except in urgent and dangerous circumstances)" and the second implementational duty is "to refrain from eliciting evidence from the detainee until he or she has had a reasonable opportunity (again, except in cases of urgency or danger)."[166]

Furthermore, if a detainee asserts his or her right to counsel and is duly diligent in exercising it, but then indicates that he or she has changed his or her mind and no longer wants legal advice, state authorities have an additional informational obligation to "tell the detainee of his or her right to a reasonable opportunity to contact a lawyer and of the obligation on the part of the police during this time not to take any statements or require the detainee to participate in any potentially incriminating process until he or she has had that reasonable opportunity."[167]

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[164] *R. v Manninen* (1987), 34 C.C.C. (3d) 385 at 392 (S.C.C.).

[165] *R. v Hebert,* [1990] 2 S.C.R. 151, 57 C.C.C. (3d) 1 at 35.

[166] *R v Bartle* (1994), 92 C.C.C. (3d) 289 at 301 (S.C.C.).

Underlying the s. 10(b) right to counsel is concern for the fair treatment of an accused person.[168]

b) Recording of interviews

For some time now, the courts have questioned why police do not tape interviews of suspects.[169] Recently, the Supreme Court noted four reasons offered by an author for why videotaping is important:

> First, it provides a means by which courts can monitor interrogation practices and thereby enforce the other safeguards. Second, it deters the police from employing interrogation methods likely to lead to untrustworthy confessions. Third, it enables courts to make more informed judgments about whether interrogation practices were likely to lead to an untrustworthy confession. Finally, mandating this safeguard accords with sound public policy because the safeguard will have the additional salutary effects besides reducing untrustworthy confessions, including more net benefits for law enforcement.[170]

The Court went on to note that, "This is not to suggest that non-recorded interrogations are inherently suspect; it is simply to make the obvious point that when a recording is made, it can greatly assist the trier of fact in assessing the confession."[171]

Thus, while the Supreme Court did not find it necessary to impose an absolute rule requiring the recording of statements, it is clear that the Court encouraged the practice.

The lower courts are offering more than words of encouragement. A number of courts have cited the lack of a recording of the interrogation as a significant factor in ruling statements of accused inadmissible on the basis that voluntariness has not been established.[172] As noted by the Ontario Court of Appeal in *Ahmed* (at para. 14),

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[167] *R. v Prosper* (1994), 92 C.C.C. (3d) 353 at 378-379 (S.C.C.).

[168] *R. v Clarkson*, (1996), 25 C.C.C. (3d) 207 at 218 (S.C.C.).

[169] *R. v Vangent and Green*, (1978), 42 C.C.C. (3d) 313 at 328-9 (Ont. Prov. Ct.).

[170] *R.* v *Oickle*, [2000] 2 S.C.R. 3, 147 C.C.C. (3d) 321, at para. 46.

[171] *Ibid*, at para 46.

[172] *R. v Moore-McFarlane*, [2001] O.J. No. 4646, 56 O.R. (3d) 737 (C.A.); *R. v Ahmed*, [2002] O.J. No. 4597 (C.A.); *R. v Bunn*, [2001] M.J. No. 31 (C.A.); *R. v Delmorone*, [2002] O.J. No. 3988 (Ont. Ct. Just.); *R. v Cameron*, [2002] O.J. No. 3545 (Ont. Sup. Ct. Just.); *R. v Li* (1997), 11 C.R. (5th) 357 (Ont. Prov. Ct.); *R. v Kjelshus*, [2001] S.J. No. 693 (Prov Ct.).

> Although the most recent case law from the Supreme Court of Canada in *R. v. Oickle* (2000), 147 C.C.C. (3d) 321 and from this court in *Moore-McFarlane* has stated that it is not necessarily fatal if the police do not record a confession, recording is not only the better practice, but in most circumstances, the failure to record will render the confession suspect.

In its earlier decision in *R. v Moore-McFarlane,*[173] the Court of Appeal came close to formulating a rule, stating that,

> ...where the suspect is in custody, recording facilities are readily available, and the police deliberately set out to interrogate the suspect without any thought to the making of a reliable record, the context inevitably makes the non-recorded interrogation suspect.[174]

It is perhaps only a matter of time before courts will routinely rule statements of accused, obtained while the accused is in custody, inadmissible in the absence of a recording or adequate explanation for the absence, at least in serious crimes.

Outside Canada, some jurisdictions have already been developing an electronic recording requirement. In the United States, courts in various states have come to require the electronic recording of custodial interrogations conducted at places of detention of individuals suspected of any major crime. As for legislation, in July 2003, Illinois became the first state to legislate an electronic recording requirement for investigations into homicide offences. The legislation[175] will require, in two years, all custodial interrogations of an accused conducted at a police station or other place of detention to be electronically recorded. "Custodial interrogation" is defined as "an interrogation during which a reasonable person in the subject's position would consider himself or herself to be in custody and during which a question is asked that is reasonably likely to elicit an incriminating response." A statement of an accused made as a result of a custodial interrogation at a place of detention will be presumed inadmissible as evidence in a prosecution involving a homicide unless an electronic recording was made of the interrogation. The legislation then goes on to provide for various situations where the statement would not be inadmissible despite the lack of electronic recording; for instance, where "electronic recording was not feasible," the police were unaware that a death had occurred, or the suspect requests that there be no electronic recording, etc.

In the United Kingdom, legislation[176] has been enacted authorizing the Secretary of State "to issue a code of practice in connection with tape-recording of interviews of persons suspected of the commission of criminal offences which are held by police officers at police stations; and to make an order requiring the tape-recording of interviews of persons suspected of the commission of criminal offences, or of such descriptions of criminal offences as may be specified in the order, which are so held, in accordance with the code…"

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[173] *supra.*

[174] *supra*, at para 65; also see *R. v Ahmed,* [2002] O.J. No. 4597 (C.A.) at para 19.

[175] *Code of Criminal Procedure of 1963*, 725 ICLS 5, Section 103.2.1.

[176] *Police and Criminal Evidence Act*, s. 60.

What then are the actual current practices of police services in Canada? A sampling conducted for the Working Group by the Canadian Association of Chiefs of Police shows that while practices may vary somewhat from jurisdiction to jurisdiction, the norm is to videotape suspect interviews for major crimes. Although the RCMP is in the process of drafting a national policy for videotaping suspects, it is currently standard practice in serious cases such as homicides for suspect interviews to be videotaped.

In British Columbia most, if not all, RCMP detachments videotape suspect interviews in serious cases. The same holds true for municipal police services in British Columbia.[177] In Alberta, it is the practice of the Edmonton Police Service, Calgary Police Service, and the RCMP to videotape interviews of suspects in major crime investigations. Investigators and front-line police officers are also being informally encouraged to videotape suspect interviews when investigating the more serious crimes, such as street robberies and break and enters into dwellings.[178] In Saskatchewan, the Regina Police Service has no formal policy of videotaping statements, however it is routine practice to do so in cases of major crimes. The Saskatoon Police Service videotapes suspect interviews for all serious offences such as murder and sexual assault, while the Estevan Police Service videotapes statements taken from suspects for all offences against the person and the Moose Jaw Police Service videotapes suspect interviews for all serious crimes, such as murder, serious assaults, sexual offences, and property crimes involving high dollar amounts or numerous incidents.

In Manitoba, the Winnipeg Police Service has a written policy providing that "[s]uspects in the following offences shall be given the opportunity to make their statements either inculpatory or exculpatory on videotape…" The listed offences are the serious major offences, such as murder, manslaughter, criminal negligence causing death or bodily harm, aggravated assault, aggravated sexual assault, sexual assault of a child, robbery (financial institution, serial, or when serious bodily injury), break and enter (major and serial and/or when occupant is injured), arson, kidnapping and extortion. Only the actual formal statement is videotaped. For the RCMP in Manitoba almost all suspect statements in major cases are now videotaped.

In Ontario, most police services videotape statements taken from those suspected of committing serious crimes, at least. In fact, the Toronto Police Service videotapes virtually every statement provided at police facilities by persons accused of committing criminal offences and usually audiotapes statements provided en route. The written policy of the Peel Regional Police Service is "to interview on videotape, all suspects of criminal offences or persons arrested for criminal offences, who have been returned to a police facility." The written policy of the Ontario Provincial Police urges that "…whenever possible, statements made by accused persons shall be audio or video recorded in such location as to preclude interruption." The policy of the Halton Regional Police Service is to have interviews of persons suspected of criminal offences videotaped. The Niagara Regional Police has a policy requiring the videotaping of all interviews of accused persons or those suspected of committing crimes. If, for some reason, videotaping facilities are not available, officers are required to record the interview on audiotape. The Greater Sudbury Police Service requires investigating officers to "audio-video tape" the interview where a statement is being taken from a person suspected or accused of committing a criminal offence unless the person objects, the audio-video equipment is "unavailable through use or malfunction," "it is not practical to do so (i.e. distance, weather conditions)," or "in the opinion of the officer it would be detrimental to the investigation to delay the recording of utterances and statements, and is of the opinion that the statements should be recorded in the traditional manner (i.e. a suspect who immediately begins to confess)."

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[177] Abbotsford, Burnaby, New Westminister, Port Moody, Vancouver.

[178] The Calgary Police Service videotapes statements made by suspects in major crimes, such as homicide, serious robberies and sexual assaults. For less serious offences, Calgary usually audiotapes interviews of suspects. The Edmonton Police Service videotapes statements of accused taken during the course of investigations into serious crimes such as homicide.

In Quebec, the Service de police de la ville de Montréal videotapes suspect interviews for serious crimes such as murder, manslaughter, armed robbery, kidnapping, forcible confinement, major cases of aggravated assault, criminal negligence causing death or serious injury, large-scale drug importation, and any other crime judged serious enough. It also videotapes every polygraph examination. The Service de police de Gatineau videotapes the taking of statements from those suspected of major crimes such as murder, sexual assault, arson, extortion, kidnapping, etc.

For the Atlantic provinces, the information is less precise; however, it would appear that most, but not all, police services videotape the taking of statements from suspects in major crime investigations.[179]

V. RECOMMENDATIONS

(a) Recording the taking of statements

While practices regarding the use of recording devices vary from jurisdiction to jurisdiction, there can be no doubt that there has been an increasing use of recording devices when police interviews are conducted. The more serious the offence, the more likely that the taking of both warned and witness statements will be recorded electronically. Certainly where the offence being investigated is a homicide, the Canadian norm is that the interviews are recorded, at least when conducted at police stations.

Arguably, the ideal would be to have every police interview electronically recorded, regardless of the seriousness of the offence being investigated, type of witness or location of the interview. In fact, the recommendation of the *Sophonow Inquiry*, on its face, although made in the context of an inquiry into a wrongful conviction for murder, strives for that ideal. However, there are certain realities that must be considered.

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[179] The Bathurst Police Service videotapes statements of suspects in serious cases, including sexual assaults; the BNPP Regional Police videotapes all statements taken from suspects in criminal cases; the Halifax Regional Police now videotape most suspect interviews, except those investigations involving the more common, less serious offences, where the cost and time required for transcription is not justified; the New Glasgow Police Service does videotape statements, however transcribing issues prevent it from doing so on a regular basis; the Charlottetown Police Department videotapes all statements taken from suspects in criminal cases; and the Summerside Police Service videotapes statements of suspects in serious cases, including sexual assaults.

Underlying the recommendations made by the courts, commissions and authors is the premise that taping, whether audio or video, is relatively inexpensive both in terms of dollars and manpower. On initial impression that would appear to be a safe assumption; however, while the actual taping may not be particularly expensive, the consequences of taping can be.

For instance, any tape made would form part of the Crown's brief. Thus, any important decisions that had to be made prior to a transcript being prepared, would require the Crown to spend significantly more time screening the tape. There is also the concern that the audio or videotaping of interviews may have a tendency to increase the length of interviews, the interviewer no longer feeling the need to be economical in his or her words now that he or she does not have to write them down. This is particularly so where the interviewer does not have to bear the cost of any transcript that might be prepared.

Perhaps the chief concern flows from the need for a transcript of the tape. When a tape is made, a transcript of the audio is usually required. The prosecutor, the defence and the trier(s) of fact all need a transcript of the audio for the trial and both counsel need their copy prior to trial. The making of transcripts is both expensive and time-consuming, thus an increase in the taping of interviews will significantly increase trial preparation costs and may lead to increased delays in advancing the court proceedings.

Furthermore, it is not clear that the actual capital costs are insignificant either. Ideally, each recording site would have a television monitor, two cameras, three to four interlinked video recorders with continuous time stamp, one audio monitor, one audio recorder, and colour video tapes. Then there are the costs relating to proper storage and the retention of equipment to access the information on the tapes in the future as technology changes.

In making recommendations in the past, it is not clear that these and related concerns have been adequately explored. The Heads of Prosecutions Committee is currently in the process of developing a "Disclosure Best Practices Protocol." In developing that protocol, the issue of costs associated with videotaping will have to be addressed, particularly those arising from transcription. Any "Disclosure Best Practices Protocol" will need some consensus among police and prosecution services as to when interviews should be electronically recorded and transcripts provided, e.g. type of case, type of witness, etc. In the meantime, a minimum requirement should be established in an effort to reduce the risk of wrongful convictions.

The recommendation contained in the MacFarlane paper provides a useful starting point for discussion. The recommendation on taping was:

> ...custodial interrogations of a suspect at a police facility in a serious case such as homicide should be videotaped. Videotaping should not be confined to the statement made by the suspect after interrogation, but the entire interrogation process. (underlining added)

The underlined words, which are essentially drawn from the *Marshall* and *Morin Inquiries*, provide some necessary restraint, while at the same time cover the situations that have produced false confessions leading to wrongful convictions in the past. With some courts beginning to rule that there should be videotaping in respect of *Criminal Code* driving offences,[180] some definition of scope at this time is advisable.

There is some concern that the phrase "in a serious case" may be too general. Is a sexual assault a "serious case"? All sexual assaults? Is a residential break and enter a serious case? Again, all of them? The consensus of the Working Group was that clearer direction could be provided by recommending that videotaping occur in "investigations involving offences of significant personal violence (eg. murder, manslaughter, criminal negligence causing death or bodily harm, aggravated assault, aggravated sexual assault, sexual assault of a child, armed robbery, etc.)." The intent is not only to provide clarity, but also to ensure that, at a minimum, investigations into those offences that have produced wrongful convictions in the past are captured by the videotaping recommendation. This is not to say that videotaping should be limited to these offences, but that at a minimum videotaping should occur in investigations involving these offences.

It should be noted that another way of dealing with the issue of when to require electronic recording was suggested. Instead of focusing on type of offence or person, perhaps the requirement could be defined by the nature of the interview. For instance, another possibility is requiring electronic recording at a police facility whenever the police provide a cautionary warning, such as *Charter* advice, the common law right to remain silent caution, *K.G.B.* warning, etc. This would avoid assessing whether the person is a suspect or whether the offence is serious enough. It would also have the added benefit of capturing interviews of unsavoury witnesses, where a videotape would be quite helpful.

One further issue arises - how much should be videotaped? Some police services tape only the making of the actual statement. Matters occurring beforehand are not taped. The Working Group concluded that this was not a practice to recommend. What leads up to the making of the "confession" has a significant bearing on the statement's voluntariness and whether there has been compliance with the *Charter*. It should be videotaped. On the other hand, to require videotaping of all events leading up to the confession, from the moment that the person in authority comes in contact with the suspect, would be neither necessary nor feasible. Thus, the Working Group recommends that the "entire interview," which would usually be what occurs in the interview room, be recorded.

The Working Group therefore recommends that the videotaping recommendation made by MacFarlane be adopted, with the revisions suggested above. Thus, as a best practice, it is recommended that:

> Custodial interviews of a suspect at a police facility in investigations involving offences of significant personal violence (eg. murder, manslaughter, criminal negligence causing death or bodily harm, aggravated assault, aggravated sexual assault, sexual assault of a child, armed robbery, etc.) should be videotaped. Videotaping should not be confined to a final statement made by the suspect, but should include the entire interview.

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[180] *R. v Delmorone*, [2002] O.J. 3988 (Ct. Just.).

(b) Investigation standards and training of police and prosecutors

Recommending specific standards is beyond the mandate of this report. A more general recommendation is contemplated at this time. Drawing from the *Morin Inquiry* and MacFarlane, it is recommended that:

> Investigation standards should be reviewed to ensure that they include standards for the interviewing of suspects (and witnesses) that are designed to enhance the reliability of the product of the interview process and to accurately preserve the contents of the interview.
>
> Police investigators and Crown prosecutors should receive training about the existence, causes and psychology of police-induced confessions, including why some people confess to crimes they have not committed, and the proper techniques for the interviewing of suspects (and witnesses) that are designed to enhance the reliability of the product of the interview process.

VI. SUMMARY OF RECOMMENDATIONS

1. **Custodial interviews of a suspect at a police facility in investigations involving offences of significant personal violence (eg. murder, manslaughter, criminal negligence causing death or bodily harm, aggravated assault, aggravated sexual assault, sexual assault of a child, armed robbery, etc.) should be video recorded. Video recording should not be confined to a final statement made by the suspect, but should include the entire interview.**

2. **Investigation standards should be reviewed to ensure that they include standards for the interviewing of suspects (and witnesses) that are designed to enhance the reliability of the product of the interview process and to accurately preserve the contents of the interview.**

3. **Police investigators and Crown prosecutors should receive training about the existence, causes and psychology of police-induced confessions, including why some people confess to crimes they have not committed, and the proper techniques for the interviewing of suspects (and witnesses) that are designed to enhance the reliability of the product of the interview process.**

CHAPTER 7 - IN-CUSTODY INFORMERS

I. INTRODUCTION

Jailhouse or in-custody informers are inmates who approach police with incriminating information about an accused, usually an alleged confession, obtained when they were in custody together. Often, the informer has shared a cell or neighbouring cell with the accused. For the purposes of this paper, an "in-custody informer" is defined as someone who: (a) allegedly receives one or more statements from an accused, (b) while both are in custody, (c) where the statements relate to offences that occurred outside of the custodial institution. The term is not meant to include a person who is intentionally placed in proximity to the accused, by the authorities, for the specific purpose of acquiring evidence and does not include a confidential informer who provides information that is used solely for the purpose of furthering a police investigation (i.e. will not be used as evidence in court).

The improper use of false evidence of in-custody informers has been a contributing factor in several high-profile wrongful convictions, both in Canada and elsewhere. The New York-based Innocence Project has found that the prosecution had used in-custody informer evidence in 21 (16.15 per cent) of the first 130 exonerations based on new DNA evidence. Inquiries in other jurisdictions have analyzed the use of in-custody informers and instigated both legislative and policy reform.[181] The use of in-custody informers was also a key area of review in both the *Morin* and *Sophonow Inquiries*.

In the Morin case, the prosecution relied on the evidence of two jailhouse informers, who claimed to have overheard a confession made by Morin while all three were inmates in jail. One of the informers shared a cell with Morin while the second occupied the cell next to his. After an exhaustive review, Justice Kaufman determined that the informers were "totally unreliable witnesses" and should not have been called:[182]

> They were predisposed, by character and psychological makeup, to lie…Since these witnesses were motivated by self interest and unconstrained by morality, they were as likely to lie as to tell the truth, depending on where their perceived self-interest lay. Their claim that Guy Paul Morin confessed…was easy to make and virtually impossible to disprove. These facts, taken together, were a ready recipe for disaster.

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[181] See, for example, the *Report on Investigation Into the Use of Informers* (Sydney: Independent Commission Against Corruption, 1993) and the *Report of the 1989-1990 Los Angeles Grand Jury: Investigation of the Involvement of Jail House Informers in the Criminal Justice System in Los Angeles County*, June 26, 1990.

[182] *Morin Inquiry*, p. 556.

Justice Kaufman noted that a number of miscarriages of justice throughout the world were likely explained, at least in part, by the "false, self-serving evidence" given by such informers:[183]

> In-custody informers are almost invariably motivated by self-interest. They often have little or no respect for the truth or their testimonial oath or affirmation. Accordingly, they may lie or tell the truth, depending only upon where their perceived self-interest lies. In-custody confessions are often easy to allege and difficult, if not impossible, to disprove.

Still, Justice Kaufman noted that no jurisdiction in the world has banned outright the use of such witnesses and observed that any prohibition of their evidence "runs against the grain of Canadian jurisprudence and is unlikely to acquire legislative or judicial acceptance." Instead, he recommended a series of stringent guidelines that preserve but limit the discretion of the prosecution to adduce in-custody informer evidence.

In the *Sophonow Inquiry*, Justice Cory was even more critical of in-custody informers. Three in-custody informers testified against Sophonow, including a man who has testified in at least nine cases in Canada. Justice Cory noted that the informer "seems to have heard more confessions than many dedicated priests." In fact, before Sophonow's third trial, no less than 11 informers had volunteered their services.

Justice Cory said there was "nothing untoward" about the use of such informers in the 1980s and Winnipeg police attempted to investigate the informers and determine their reliability. But it does demonstrate "the ease with which experienced officers and Crown counsel" can be fooled by such witnesses. The real problem, Justice Cory noted, was the failure of the Crown to disclose important information about the informers to the defence and this "contributed significantly" to Sophonow's wrongful conviction.

Justice Cory was scathing in his description of this category of witnesses:

> Jailhouse informers comprise the most deceitful and deceptive group of witnesses known to frequent the courts. The more notorious the case, the greater the number of prospective informers. They rush to testify like vultures to rotting flesh or sharks to blood. They are smooth and convincing liars. Whether they seek favours from the authorities, attention or notoriety they are in every instance completely unreliable. It will be seen how frequently they have been a major factor in the conviction of innocent people and how much they tend to corrupt the administration of justice. Usually, their presence as witnesses signals the end of any hope of providing a fair trial.
>
> They must be recognized as a very great danger to our trial system. Steps must be taken to rid the courts of this cancerous corruption

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[183] *Morin Inquiry*, p. 602.

> of the administration of justice. Perhaps, the greatest danger flows from their ability to testify falsely in a remarkably convincing manner… Jailhouse informers are a festering sore. They constitute a malignant infection that renders a fair trial impossible. They should, as far as it is possible, be excised and removed from our trial process.

He summarized the findings about such witnesses as follows:

1) Jailhouse informers are polished and convincing liars.
2) All confessions of an accused will be given great weight by jurors.
3) Jurors will give the same weight to "confessions" made to jailhouse informers as they will to a confession made to a police officer.
4) "Confessions" made to jailhouse informers have a cumulative effect and, thus, the evidence of three jailhouse informers will have a greater impact on a jury than the evidence of one.
5) Jailhouse informers rush to testify particularly in high profile cases;
6) They always appear to have evidence that could only come from one who committed the offence.
7) Their mendacity and ability to convince those who hear them of their veracity make them a threat to the principle of a fair trial and, thus, to the administration of justice.

Justice Cory noted Justice Kaufman's recommendations but went further and said:

> By now it must be clear that jailhouse informers are so unreliable that they tend to undermine criminal trials...Their testimony has all too often resulted in a wrongful conviction… How many wrongful convictions must there be before the use of these informers is forbidden or, at least, confined to very rare cases.

His specific recommendations are detailed in the next section.

II. CANADIAN COMMISSIONS OF INQUIRY

a) Commission on Proceedings Involving Guy Paul Morin

> **Recommendation 36 - Ministry guidelines for limited use of informers**
>
> In the face of serious concerns about the inherent unreliability of in-custody informers, the decision whether to tender their evidence should be regulated by Ministry guidelines. The Ministry of the Attorney General should substantially revise its existing

guidelines, in accordance with the specific recommendations below, to significantly limit the use of in-custody informers to further a criminal prosecution.

Recommendation 37 - Crown policy clearly articulating informer dangers

The current Crown policy does not adequately articulate the dangers associated with the reception of in-custody informer evidence. Further, the statement that such witnesses "may seek, and in rare cases, will receive, some benefit for their participation in the Crown's case" does not conform to the extensive evidence before me. The Crown policy should reflect that such evidence has resulted in miscarriages of justice in the past or been shown to be untruthful. Most such informers wish to benefit for their contemplated participation as witnesses for the prosecution. By definition, in-custody informers are detained by authorities, either awaiting trial or serving a sentence of imprisonment. The danger of an unscrupulous witness manufacturing evidence for personal benefit is a significant one.

Recommendation 38 - Limitations upon Crown discretion in the public Interest

The current Crown policy provides that the use of an in-custody informer as a witness should only be considered in cases in which there is a compelling public interest in the presentation of their evidence. This would include the prosecution of serious offences. Further, it is unlikely to be in the public interest to initiate or continue a prosecution based only on the unconfirmed evidence of an in-custody informer. The policy should, instead, reflect that (a) the seriousness of the offence, while relevant, will not, standing alone, demonstrate a compelling public interest in the presentation of their evidence. Indeed, in some circumstances, the seriousness of the offence may militate against the use of their evidence; (b) it will never be in the public interest to initiate or continue a prosecution based only upon the unconfirmed evidence of an in-custody informer.

Recommendation 39 - Confirmation of in-custody informer evidence defined

The current Crown policy notes that confirmation, in the context of an in-custody informer, is not the same as corroboration. Confirmation is defined as evidence or information available to the Crown which contradicts a suggestion that the inculpatory aspects of the proposed evidence of the informer was fabricated. This definition does not entirely meet the concerns that prompt the need for confirmation. Confirmation should be defined as *credible* evidence or information, available to the Crown, *independent of the in-custody informer*, which *significantly supports* the position that the inculpatory aspects of the proposed evidence were not fabricated. One in-custody informer does not provide confirmation for another.

Recommendation 40 - Approval of supervising Crown counsel for informer use

The current Crown policy provides that, if the Crown's case is based exclusively, or principally, on evidence of an in-custody informer, the prosecutor must bring the case to the attention of their supervising Director of Crown Operations as soon as practicable and the Director's approval must be obtained before taking the case to trial. The policy should, instead, reflect that, if the prosecutor determines that the prosecution case *may rely, in part*, on in-custody informer evidence, the prosecutor must bring the case to the attention of their supervising Director of Crown Operations as soon as practicable and the Director's approval must be obtained before taking the case to trial. The Ministry of the Attorney General should also consider the feasibility of establishing an In-Custody Informer Committee (composed of senior prosecutors from across the province) to approve the use of in-custody informers and to advise prosecutors on issues relating to such informers, such as means to assess their reliability or unreliability, and the appropriateness of contemplated benefits for such informers.

Recommendation 41 - Matters to be considered in assessing informer Reliability

The current Crown policy lists matters which Crown counsel may take into account in assessing the reliability of an in-custody informer. Those matters do not adequately address the assessment of reliability and place undue reliance upon matters which do little to enhance the reliability of an informer's claim. The Crown policy should be amended to reflect that the prosecutor, the supervisor or any Committee constituted should consider the following elements:

a) The extent to which the statement is confirmed in the sense earlier defined;

b) The specificity of the alleged statement. For example, a claim that the accused said "I killed A.B." is easy to make but extremely difficult for any accused to disprove;

c) The extent to which the statement contains details or leads to the discovery of evidence known only to the perpetrator;

d) The extent to which the statement contains details which could reasonably be accessed by the in-custody informer, other than through inculpatory statements by the accused. This consideration need involve an assessment of the information reasonably accessible to the in-custody informer, through media reports, availability of the accused's Crown brief in jail, etc. Crown counsel should be mindful that, historically, some informers have shown great ingenuity in securing information thought to be unaccessible to them. Furthermore, some informers have converted details communicated by the accused in the context of an exculpatory statement into details which purport to prove the making of an inculpatory statement;

e) The informer's general character, which may be evidenced by his or her criminal record or other disreputable or dishonest conduct known to the authorities;

f) Any request the informer has made for benefits or special treatment (whether or not agreed to) and any promises which may have been made (or discussed with the informer) by a person in authority in connection with the provision of the statement or an agreement to testify;

g) Whether the informer has, in the past, given reliable information to the authorities;

h) Whether the informer has previously claimed to have received statements while in custody. This may be relevant not only to the informer's reliability or unreliability but, more generally, to the issue whether the public interest would be served by utilizing a recidivist informer who previously traded information for benefits;

i) Whether the informer has previously testified in any court proceeding, whether as a witness for the prosecution or the defence or on his or her behalf, and any findings in relation to the accuracy and reliability of that evidence, if known;

j) Whether the informer made some written or other record of the words allegedly spoken by the accused and, if so, whether the record was made contemporaneous to the alleged statement of the accused;

k) The circumstances under which the informer's report of the alleged statement was taken *(e.g.* report made immediately after the statement was made, report made to more than one officer, etc.);

l) The manner in which the report of the statement was taken by the police *(e.g.* through use of non-leading questions, thorough report of words spoken by the accused, thorough investigation of circumstances which might suggest opportunity or lack of opportunity to fabricate a statement). Police should be encouraged to address all of the matters relating to the Crown's assessment of reliability with the informer at the earliest opportunity. Police should also be encouraged to take an informer's report of an alleged in-custody statement under oath, recorded on audio or videotape, in accordance with the guidelines set down in *R. v. K.G.B.* However, in considering items 10 to 12, Crown counsel should be mindful that an accurate, appropriate and timely interview by police of the informer may not adequately address the dangers associated with this kind of evidence;

m) Any other known evidence that may attest to or diminish the credibility of the informer, including the presence or absence of any relationship between the accused and the informer;

n) Any relevant information contained in any available registry of informers.

Recommendation 42 - Limited role of Crown counsel conferring benefits

Crown counsel involved in negotiating potential benefits to be conferred on an in-custody informer should generally not be counsel ultimately expected to tender the evidence of the informer. This recommendation supports the current Crown policy in Ontario.

Recommendation 43 - Agreements with informers reduced to writing

The Ministry of the Attorney General should amend its Crown Policy Manual to impose a positive obligation upon prosecutors to ensure that any agreements made with in-custody informers relating to benefits or consideration for co-operation should, absent exceptional circumstances, be reduced to writing and signed by a prosecutor, the informer and his or her counsel (if represented). An oral agreement, fully reproduced on videotape, may substitute for such written agreement. As well, in accordance with present Crown policy, any such agreements respecting benefits or consideration for co-operation should be approved by a Director of Crown Operations.

Recommendation 44 - Restrictions upon benefits promised or conferred

a) An agreement with an in-custody informer should provide that the informer should expect no benefits to be conferred which have not been previously agreed to and, specifically, that the informer should expect no additional benefits in relation to future or, as of yet, undiscovered criminality. Indeed, such criminality may disentitle the in-custody informer to any benefits previously agreed to but not yet conferred.

b) Where the in-custody informer subsequently seeks additional benefits nonetheless (particularly in connection with additional criminal charges which he or she faces or may face) prior to the completion of any testimony he or she may give, Crown counsel (and, where practicable, any supervisor or Committee constituted) should re-assess the use of the in-custody informer as a witness in accordance with the criteria set out in the Crown Policy Manual.

c) Where additional benefits (that is, benefits not previously agreed to or necessarily incidental to a prior agreement) are sought by the in-custody informer subsequent to his or her completed testimony (particularly in connection with additional criminal charges which he or she faces or may face), they should not be conferred by Crown counsel. Indeed, Crown counsel should advise the Court addressing any additional criminal charges that the informer was made aware that he or she could not expect additional benefits in relation to future or, as of yet, undiscovered criminality when the earlier agreement was reached, and that the informer is not entitled to any credit from the court for past co-operation.

d) The commission of additional crimes should generally disqualify the witness from future use by the prosecution as a jailhouse informer in other cases.

Recommendation 45 - Conditional benefits

Any agreement respecting benefits should not be conditional upon a conviction. The Ministry of the Attorney General should establish a policy respecting other conditional or contingent benefits.

Recommendation 46 - Policy on kinds of benefits conferred

The Ministry of the Attorney General should establish a policy which sets limitations on the kinds of benefits that may be conferred on jailhouse in-custody informers or appropriate preconditions to their conferral.

Recommendation 47 - Disclosure respecting in-custody informers

The current Crown policy reflects that the dangers of using in-custody informers in a prosecution give rise to a heavy onus on Crown counsel to make complete disclosure. Without limiting the extent of that onus, the policy lists disclosure items that should be reviewed to ensure full and fair disclosure. The disclosure policy is generally commendable. Some fine-tuning of the items listed is required to give effect to the onus to make complete disclosure. The items should read, in the least:

a) The criminal record of the in-custody informer including, where accessible to the police or Crown, the synopses relating to any convictions.

b) Any information in the prosecutors' possession or control respecting the circumstances in which the informer may have previously testified for the Crown as an informer, including, at a minimum, the date, location and court where the previous testimony was given. (The police, in taking the informer's statement, should inquire into any prior experiences testifying for either the provincial or federal Crown as an informer or as a witness generally.)

c) Any offers or promises made by police, corrections authorities, Crown counsel, or a witness protection program to the informer or person associated with the informer in consideration for the information in the present case.

d) Any benefit given to the informer, members of the informer's family or any other person associated with the informer, or any benefits sought by such persons, as consideration for their co-operation with authorities, including but not limited to those kinds of benefits already listed in the Crown Policy Manual.

e) As noted earlier, any arrangements providing for a benefit (as set out above) should, absent exceptional circumstances, be reduced to writing and signed and/or be recorded on videotape. Such arrangements should be approved by a Director of Crown Operations or the In-Custody Informer Committee and disclosed to the defence prior to receiving the testimony of the witness (or earlier, in accordance with *Stinchcombe*).

f) Copies of the notes of all police officers, corrections authorities or Crown counsel who made, or were present during, any promises of benefits to, any negotiations respecting benefits with, or any benefits sought by, an in-custody informer. There may be additional notes of officers or corrections authorities which may also be relevant to the in-custody informer's testimony at trial.

g) The circumstances under which the in-custody informer and his or her information came to the attention of the authorities.

h) If the informer will not be called as a Crown witness, a disclosure obligation still exists, subject to the informer's privilege.

Recommendation 48 - Post-conviction disclosure by Crown counsel

The Ministry of the Attorney General should remind Crown counsel of the positive and continuing obligation upon prosecutors to disclose potentially exculpatory material to the defence post-conviction, whether or not an appeal is pending. Such material should also be provided to the Crown Law Office.

Recommendation 49 - Post-conviction continuing disclosure by police

The Durham Regional Police Service should amend its operational manual to impose a positive and continuing obligation upon its officers to disclose potentially exculpatory material to the Durham Crown Attorney's Office, or directly to the Crown Law Office, post-conviction, whether or not an appeal is pending. The Ministry of the Solicitor General should facilitate the creation of a similar positive obligation upon all Ontario police forces.

Recommendation 50 - Access to confidential informer records

A Joint Committee on Disclosure Issues should consider potential policy changes to effect broader access by police, prosecutors and defence counsel to confidential records potentially relevant to the reliability of an in-custody informer.

Recommendation 51 - Prosecution of informer for false statements

Where an in-custody informer has lied either to the authorities or to the Court, Crown counsel should support the prosecution of that informer, where there is a reasonable prospect of conviction, to the appropriate extent of the law, even if his or her false claims were not to be tendered in a criminal proceeding. The prosecution of informers who attempt (even unsuccessfully) to falsely implicate an accused is, of course, intended, amongst other things, to deter like-minded members of the prison population. This policy should be reflected in the Crown Policy Manual.

Recommendation 52 - Extension of Crown policy to analogous persons

The current Crown policy defines "in-custody informer" to address one type of in-custody witness whose evidence is particularly problematic. However, the policy does not address similar categories of witnesses who raise similar, but not identical, concerns. For example, a person facing charges, or a person in custody who claims to have observed relevant events or heard an accused confess while both were out of custody, may be no less motivated than an in-custody informer to falsely implicate an accused in return for benefits. The Crown Policy Manual should, therefore, be amended to reflect that Crown counsel should be mindful of the concerns which motivate the policy respecting in-custody informers, to the extent applicable to other categories of witnesses, in the exercise of prosecutorial discretion generally.

Recommendation 53 - Revisions to police protocols respecting informers

The Durham Regional Police Service should revise Operations Directive 04-17 to specifically address in-custody informers as a special class of informers. This directive should reinforce the inherent risks associated with such informers, the need for special precautions in dealing with them and establish special protocols for such dealings. These protocols should also address the method by which an informer's reliability should be investigated. The Ministry of the Solicitor General should facilitate the creation of a similar directive for all Ontario police forces.

Recommendation 54 - Creation of informer registry

The Ministry of the Attorney General should establish an in-custody informer registry, designed to make available to prosecutors, defence counsel and police, information concerning the prior testimonial involvement of in-custody informers, any benefits requested, benefits agreed to or conferred, and any prior assessment of reliability made by police, prosecutors or the Court of an informer.

Recommendation 55 - Crown contribution to informer registry

The Ministry of the Attorney General should amend the Crown Policy Manual to impose a positive obligation upon prosecutors to provide relevant information to the registry and to ensure disclosure to the defence of relevant information contained in the registry.

Recommendation 56 - Police contribution to informer registry

The Durham Regional Police Service should amend its operational manual to impose a positive obligation upon its officers to provide relevant information to the registry. The Ministry of the Solicitor General should facilitate the creation of a similar positive obligation upon all Ontario police forces.

Recommendation 57 - Creation of national in-custody informer registry

The Government of Ontario should use its good offices to promote a national in-custody informer registry.

Recommendation 58 - Police videotaping of informers

The Durham Regional Police Service should amend its operational manual to provide that all contacts between police officers and in-custody informers must, absent exceptional circumstances, be videotaped or, where that is not feasible, audiotaped. This policy should also provide that officers receive statements from such informers under oath, where reasonably practicable. The Ministry of the Solicitor General should facilitate the creation of a similar policy for all Ontario police forces.

Recommendation 59 - Reliability *voir dires* for informer evidence

Consideration should be given to a legislative amendment, providing that the evidence of an in-custody informer as to the accused's statement(s) is presumptively inadmissible at the instance of the prosecution unless the trial judge is satisfied that the evidence is reliable, having regard to all the circumstances.

Recommendation 60 - Crown education respecting informers

The Ministry of the Attorney General should commit financial and human resources to ensure that prosecutors are fully educated and trained as to in-custody informers. Such educational programming should fully familiarize all Crown attorneys with the Crown policies respecting in-custody informers and appropriate methods of dealing with, and assessing the reliability of, such informers.

Recommendation 61 - Police education respecting informers

Adequate financial and human resources should be committed to ensure that Durham Regional police officers are fully educated and trained as to in-custody informers. The Ministry of the Solicitor General should liaise with other Ontario police services to ensure that similar education is provided to police forces which are likely to deal with in-custody informers. Such educational programming should fully familiarize all investigators with the police protocols respecting in-custody informers and appropriate methods of dealing with, and investigating the reliability of, such informers.

Recommendation 62 - Protocols respecting correctional records

The Ministry of the Solicitor General and Correctional Services should establish protocols (which may be incorporated in whole or in part in legislative amendments) governing access to and retention of correctional records, potentially relevant to criminal cases.

Recommendation 63 - Access by police officers to correctional facilities

The Ministry of the Solicitor General and Correctional Services should ensure that a record is invariably kept of police (and other) attendances at any provincial correctional institute. The sensitivity of a particular attendance may affect what, if any, access is given to such a record, but that should not obviate the necessity for its invariable existence.

Recommendation 64 - Placement of inmates

An accused and another inmate should not be placed together to facilitate the collection of evidence against the accused, where that placement otherwise violates institutional placement policies. In other words, the police should not encourage correctional authorities to permit an inappropriate placement to facilitate the collection of evidence. Where a placement is requested, the request should be recorded, together with the reasons stated and the identity of the requesting party.

Recommendation 65 - Placement of witnesses

Where inmates have already been identified as witnesses in a criminal case, they should be placed, wherever possible, so as to reduce the potential of inter-witness contamination. This generally means that prosecution jailhouse witnesses in the same case should not be placed together, where such separation is reasonably practicable.

Recommendation 66 - Storage and security of defence papers

The Ministry of the Solicitor General and Correctional Services should establish protocols to ensure that the accused's legal papers can remain exclusively within his or her control in the correctional institution.

Recommendation 67 - Timing and content of informer jury caution

> Where the evidence of an in-custody informer is tendered by the prosecution and its reliability is in issue, trial judges should consider cautioning the jury in terms stronger than those often contained in a *Vetrovec* warning, and to do so immediately before or after the evidence is tendered by the prosecution, as well as during the charge to the jury.

Recommendation 68 - Crown videotaping of informers

> The Ministry of the Attorney General should amend its Crown Policy Manual to encourage all contacts between prosecutors and in-custody informers to be videotaped or, where that is not feasible, audiotaped.

Recommendation 69 - Informer as state agent

> Where an in-custody informer actively elicits a purported statement from an accused in contemplation that he or she will then offer himself or herself up as a witness in return for benefits, he or she should be treated as a state agent.

b) The Inquiry Regarding Thomas Sophonow

1. As a general rule, jailhouse informers should be prohibited from testifying. They might be permitted to testify in a rare case, such as kidnapping, where they have, for example, learned of the whereabouts of the victim. In such a situation, the police procedure adopted should be along the following lines:

- Upon learning of the alleged confession made to a jailhouse informer, the police should interview him. The interview should be videotaped or audiotaped from beginning to end. At the outset, the jailhouse informer should be advised of the consequences of untruthful statements and false testimony. The statement would then be taken with as much detail as can be ascertained.

- Before it can even be considered, the statement must be reviewed to determine whether this information could have been garnered from media reports of the crime, or from evidence given at the preliminary hearing or from the trial if it is underway or has taken place.

- If the police are satisfied that the information could not have been obtained in this way, consideration should then be given as to whether the purported statement by the accused to the informer has:

A. revealed material that could only be known by one who committed the crime;
B. disclosed evidence that is, in itself, detailed, significant and revealing as to the crime and the manner in which it was committed; and
C. been confirmed by police investigation as correct and accurate.

- Even then, in those rare circumstances, such as a kidnapping case, the testimony of the jailhouse informer should only be admitted, provided that the other conditions suggested by Justice Kaufman in his Inquiry have been met.

- In particular, the Trial Judge will have to determine on a voir dire whether the evidence of the jailhouse informer is sufficiently credible to be admitted, based on the criteria suggested by Justice Kaufman.

2. Further, because of the unfortunate cumulative effect of alleged confessions, only one jailhouse informer should be used.

3. In those rare cases where the testimony of a jailhouse informer is to be put forward, the jury should still be instructed in the clearest of terms as to the dangers of accepting this evidence. It may be advisable as well to point specifically to both the Morin case and the Sophonow case as demonstrating how convincing, yet how false, the evidence was of jailhouse informers.

4. There must be a very strong direction to the jury as to the unreliability of this type of evidence. In that direction, there should be a reference to the ease with which jailhouse informers can, on occasion, obtain access to information which would appear that only the accused could know. Because of the weight jurors attach to the confessions and statements allegedly made to these unreliable witnesses, the failure to give the warning should result in a mistrial.

It may be that the best hope for curtailing the evil doings of jailhouse informers, lies in all the Provinces accepting the Manitoba Guidelines with the additional recommendations which I have suggested. It should become apparent to all that a good case for the Crown does not need to be supported by the treacherous testimony of jailhouse informers.

III. MACFARLANE PAPER

MacFarlane states that jailhouse informers are "the most dangerous of all witnesses" and says it is critical that those in a position of authority take steps to scrutinize the evidence carefully and restrict its use to those cases for which there is a clear basis to believe that the evidence can safely be relied upon. Specifically, he recommends prosecution services:[184]

1. Establish a screening committee of senior prosecutors to assess whether a jailhouse informer should be called at trial. Helpful assessment criteria were recommended by Justice Kaufman in the *Morin Commission Report* (1998). They were subsequently adopted by Justice Cory in the *Sophonow Commission Report* (2001), and were again referred to with approval by

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[184] pp. 84-85.

the Commission on Capital Punishment presented to Illinois Governor George Ryan in 2002.

2. Establish a publicly accessible registry of all decisions taken by the jailhouse informer screening committee.

3. Enter into a written agreement with the witness, in which all of the undertakings, terms and conditions of the testimony are agreed upon. It should then be provided to the defence as part of the pre-trial disclosure, and tendered in evidence when the witness testifies.

4. Ensure the police videotape all interviews with the witness.

5. *Not* call more that one jailhouse informer in any given case, because of the cumulative effect of multiple witnesses.

6. *Not* proceed to trial where the testimony of the jailhouse informer is the only evidence linking the accused to the offence.

7. *Not* tender the evidence of a jailhouse informer who has a previous conviction for perjury, or any other crime for dishonesty under oath, unless the admission sought to be tendered was audio or video recorded, or the statements attributed to the accused are corroborated in a material way.

IV. CASE LAW

a) The Vetrovec Warning

Currently it is within the discretion of the trial judge to warn the jury about the reliability of a witness's testimony by way of a *Vetrovec* warning.[185] In *Vetrovec*, Justice Dickson held that a trial judge has the discretion to issue a clear and sharp warning to the jury directed at the testimony of certain "unsavoury" witnesses. Justice Dickson made it clear that the trial judge did not have a positive duty to issue such a warning and that a common sense approach, rather than "empty formalism," should be employed. He said:[186]

> Rather than attempting to pigeon-hole a witness into a category and then recite a ritualistic incantation, the trial judge might better direct his mind to the facts of the case, and thoroughly examine all the factors which might impair the worth of a particular witness. If, in his judgment, the credit of the witness is such that the jury

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[185] *Vetrovec v. The Queen*, [1982] 1 S.C.R. 811. Note that the *Morin Inquiry* did not advocate for a mandatory warning about the dangers of in-custody informer testimony in all cases, however, it did recommend that trial judges should consider issuing a warning stronger than the standard *Vetrovec* warning when in-custody informer evidence is introduced.

[186] *Ibid.* at 823.

> should be cautioned, then he may instruct accordingly. If, on the other hand, he believes the witness to be trustworthy, then, regardless of whether the witness is technically an "accomplice" no warning is necessary.

The trial judge's discretion to provide the jury with a warning was further described by Dickson, J. as follows:[187]

> Because of the infinite range of circumstances which will arise in the criminal trial process it is not sensible to attempt to compress into a rule, a formula, or a direction the concept of the need for prudent scrutiny of the testimony of any witness. What may be appropriate, however, in some circumstances, is a clear and sharp warning to attract the attention of the jurors to the risks of adopting, without more, the evidence of the witness.

The Ontario Court of Appeal, in *R. v. Trudel*, [2004] O.J. No. 248 (C.A.), discussed the purpose of a *Vetrovec* warning and made specific mention of its importance in cases involving the testimony of in-custody informers:[188]

> The purpose of the *Vetrovec* warning is to alert the jury that there is a special need for caution in approaching the evidence of certain witnesses whose evidence plays an important role in the proof of guilt. The caution is of particular importance where there are defects in the evidence of a witness that may not be apparent to a lay trier of fact. Perhaps the most important of these is the jailhouse informer. Recent experience has shown that jailhouse informers are a particularly dangerous type of witness. *The Report of the Commission on Proceedings Involving Guy Paul Morin* (Toronto: Ontario Ministry of the Attorney General, 1998) and *The Report of the Inquiry Regarding Thomas Sophonow* (Winnipeg, Man.: Manitoba Justice, 2001) have shown that these witnesses can be very convincing liars and are capable of fabricating evidence. The Morin Inquiry Report was released in 1998 and the Sophonow Inquiry Report was released in 2001. The trial judge therefore did not have the benefit of these reports. This recent experience also shows that the motives of these witnesses may not always be apparent and that their expressed purposes for testifying, such as a distaste for the accused's particular crime, or to tell the truth and make a clean break from their criminal past are simply untrue. Their claims that they neither sought an advantage nor received one have been shown to be patently false.

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[187] *Ibid.* at 831.

[188] *R. v. Trudel*, [2004] O.J. No. 248 (C.A.) at para. 76.

b) Providing a Vetrovec Warning in In-Custody Informer Cases

The Supreme Court of Canada considered the issue of providing a *Vetrovec* warning with respect to in-custody informer evidence in the case of *R. v. Brooks*, [2000] 1 S.C.R. 237. The Court split four to three on whether a *Vetrovec* warning ought to have been included in the trial judge's charge to the jury on the evidence of the two disreputable Crown witnesses. Although the majority of the Court held that the accused's conviction should be upheld, only three of the four justices in the majority agreed that the trial judge was correct in not issuing a warning about the in-custody informer testimony to the jury.[189] The fourth member of the majority, Binnie J., agreed that the conviction should be upheld on the sum of the evidence, but sided with the minority in ruling that the trial judge erred in not issuing a *Vetrovec* warning with respect to the in-custody informer testimony.

Major J., writing for the majority on this issue,[190] found that the trial judge erred in failing to give a *Vetrovec* warning. He stated that two main factors are relevant when deciding whether a warning is necessary:

- the witness's credibility; and
- the importance of the witness's testimony to the Crown's case.

Major J. considered the recommendations of the *Morin Inquiry* and the implications of these recommendations with respect to the credibility problems associated with jailhouse informers. He noted that the trial judge in the case did not have the benefit of this report, but said that with its availability, trial judges should consider such factors as these in determining whether or not a *Vetrovec* warning is necessary in the circumstances of a particular trial. Major J. stated that the credibility of the two informers was inherently suspect and that the risks associated with the use of jailhouse informers, along with the character of the witnesses and the conditions to be considered in the *Morin Inquiry*, should have led the trial judge to provide a *Vetrovec* warning. In addition, while there was independent circumstantial evidence against the accused, the evidence of the informers was of sufficient importance to mandate a *Vetrovec* warning.

Major J. stated that, at minimum, a proper *Vetrovec* warning must focus the jury's attention specifically on the inherently unreliable evidence. It should refer to the characteristics of the witness that bring the credibility of the evidence into serious question and should plainly emphasize the dangers inherent in convicting an accused on the basis of such evidence unless confirmed by independent evidence.

In his separate judgment, Binnie J. found that the evidence of the "jailhouse informants" in the case was tainted by a combination of some of the more notorious badges of testimonial unreliability, including the opportunity to lie for personal benefit, and the jury ought to have been given a clear and sharp warning to that effect. However, he concluded that the verdict would have been the same had the error not been made, given the strength of the evidence against the accused.

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[189] Bastarache J., writing for the minority on this issue, ruled that it is not necessary to give a *Vetrovec* warning where the witness is a jailhouse informer if the trial judge believes that the witness can be trusted. He found there was a basis here for the trial judge to exercise his discretion and not give a warning.

[190] Major J. was in the minority on the ultimate issue in deciding that the conviction should be quashed and a new trial ordered.

Binnie J. set out some of the case law and literature that has considered the dangers posed by the testimony of in-custody informers:[191]

> The courts have grappled for some years with a growing concern that a conviction based on the evidence of jailhouse informants has led in the past to some wrongful convictions and should be treated with special caution: *R. v. Frumusa* (1996), 112 C.C.C. (3d) 211 (Ont. C.A.); *R. v. Simmons* (1998), 105 O.A.C. 360 (C.A.); Report of The Commission on Proceedings Involving Guy Paul Morin, the Honourable Fred Justice Kaufman, C.M., Q.C., 1998; C. Sherrin, "Jailhouse Informants, Part I: Problems with their Use" (1998), 40 C.L.Q. 106, and "Jailhouse Informants in the Canadian Criminal Justice System, Part II: Options for Reform" (1998), 40 C.L.Q. 157; the Report of the 1989-1990 Los Angeles Grand Jury: Investigation of the Involvement of Jail House Informants in the Criminal Justice System in Los Angeles County (June 26, 1990). The most extensive review of this issue in Canada is the Justice Kaufman Report, which concludes at p. 638:
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>> The evidence at this Inquiry demonstrates the inherent unreliability of in-custody informer testimony, its contribution to miscarriages of justice and the substantial risk that the dangers may not be fully appreciated by the jury.

Binnie J. stated that the trigger for caution when dealing with the testimony of in-custody informers is not so much the label "jailhouse informant" as it is the existence of a number of factors that can affect the credibility of the particular witness:[192]

> ... 'jailhouse informant' is a term that conveniently captures a number of factors that are highly relevant to the need for caution. These include the facts that the jailhouse informant is already in the power of the state, is looking to better his or her situation in a jailhouse environment where bargaining power is otherwise hard to come by, and will often have a history of criminality.

He observed that the two informers in the case exhibited the worst features of jailhouse informers, in that they were career criminals who had a history of coming forward to offer incriminating testimony in return for personal gain. The jury in the case should have been warned to proceed with caution. Binnie J. disagreed with Bastarache J. that the trial judge's instruction to the jury on credibility amply conveyed the dangers associated with the informer's testimony because the trial judge did not clearly express to the jury the risks of adopting, without more, the evidence of these witnesses.

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[191] *R. v. Brooks* at p. 285.

[192] *R. v. Brooks*, at p. 286.

In *R. v. Baltrusaitis* (2002), 58 O.R. (3d) 161 (C.A.), a first-degree murder case, the Ontario Court of Appeal considered *Brooks, supra* in deciding whether it was incumbent on the trial judge to provide the jury with a *Vetrovec* warning with respect to the evidence of a jailhouse informer. The Court held that a *Vetrovec* warning was required because the informer's testimony suffered from serious credibility problems and, although his evidence was perhaps not crucial to the Crown's case, it was very important to it. The informer's credibility was inherently suspect because he was a young man with a substantial criminal record; many of his convictions involved offences of dishonesty and untrustworthiness; he had shown in the past that he was willing to sacrifice the interests of a good friend to further his own self-interest; his motivation for contacting the authorities and cooperating with them was based entirely on his own self-interest; he gave evidence at trial that was inconsistent with his initial statement to the police; and he attributed information to the accused that was clearly incorrect. The Court found his credibility problems to be extremely serious, if not overwhelming. With respect to the importance of his testimony, the Court said: "his was the only direct evidence implicating the accused as the killer. In that sense, it provided the Crown with the fill needed to plug the potential cracks in its circumstantial case."[193]

The Court also found that the trial judge should have warned the jury, by way of direction, of the possibility that the informer received innocent information from the appellant and converted it into inculpatory evidence. Moldaver J.A. said:[194]

> To my mind, this is one of the great dangers associated with the testimony of jailhouse informers and in cases where it conceivably exists, the jury should be alerted to it and told to proceed with extreme caution. (For an insightful and comprehensive discussion of the many dangers associated with the testimony of jailhouse informants see The Honourable Justice Peter Cory, "Report on the Inquiry Regarding Thomas Sophonow" (2001), at pp. 63-74).

Based on these, and other, errors, the Court quashed the conviction and ordered a new trial.

c) Independent Confirmatory Evidence

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[193] *R. v. Baltrusaitis* (2002), 58 O.R. (3d) 161 (C.A.) at para. 55.

[194] *Ibid.* at para. 66.

Major J. explained in *Brooks, supra,* at para. 95, that the *Vetrovec* warning "should also be accompanied by a reference to the evidence capable of providing independent confirmation of the unsavoury witness's testimony. The independent confirmation relates to other evidence that would support the credibility of the unsavoury witness." In *R. v. Kehler,* [2004] S.C.J. No. 1, the Supreme Court held that while confirmatory evidence should be capable of restoring the trier's faith in relevant aspects of the witness's account, the term "relevant" should not be equated with "disputed." Triers of fact will not lightly accept unsupported assertions by a disreputable witness where nothing but his or her word implicates the accused in the commission of the crime charged. However, having considered the totality of the evidence, the trier of fact is entitled to believe the evidence of the disreputable witness – even on disputed facts not otherwise confirmed – if the trier is satisfied that the witness, despite his or her frailties or shortcomings, is truthful.

In *R. v. Dhillon,* [2002] O.J. No. 2275 (C.A.), the Ontario Court of Appeal quashed a murder conviction and ordered a new trial because of the trial judge's improper instruction on evidence capable of confirming the testimony of the jailhouse informer. The Court held that the trial judge quite properly decided to give the jury a *Vetrovec* warning about the informer's evidence. The trial judge reviewed with the jury the disreputable nature of the witness's character, including his criminal record, and he repeated to the jury several times that, as a matter of common sense, they needed to find some confirmatory evidence tending to persuade them that the jailhouse informer was telling the truth before they could rely on his evidence. The Court of Appeal found the trial judge erred in illustrating for the jurors the type of evidence they might find to be corroborative, as six of the seven examples the trial judge gave of potentially confirmatory evidence were not capable of confirming the evidence of the jailhouse informer. The Court held that leaving this evidence with the jury as confirmatory evidence amounted to an error of law.

V. IN-CUSTODY INFORMER POLICIES CURRENTLY IN PLACE

In response to the *Morin* and *Sophonow Inquiries,* a number of provinces have issued policies and guidelines on the use of in-custody informer evidence.

a) Manitoba

Following on the heels of the *Sophonow Inquiry,* and in recognition of the inherent dangers associated with this type of witness, on November 5, 2001, the Manitoba Department of Justice issued its in-custody informer policy directive.

The directive states, "Except in the unusual circumstances as permitted by this policy directive, in-custody informers *should not be* called to testify on behalf of the Crown." The policy applies where any inmate, imprisoned in either a provincial or federal correctional facility, anywhere in Canada, usually pending a trial or awaiting sentence, claims to have heard another prisoner make an admission about his or her case and seeks to testify about it on behalf of the Crown. It is immaterial whether the proposed inmate witness seeks a benefit from the Crown or not. The policy does not apply in the case of police undercover operators nor to limit the use of in-custody informers to advance police investigations.

Before being considered, the statement of the in-custody informer must be reviewed to ascertain whether the information could have been garnered from other sources. If not, then the full circumstances of the case and background of the informer must be assessed pursuant to a lengthy set of criteria.

The directive states that the Crown should never call an in-custody informer who has a previous conviction for perjury or other convictions for dishonesty under oath, unless the admission of the accused has been recorded (via audio or video) and the authenticity of the recording has been verified. The Crown should not proceed to trial where the testimony of the in-custody informer is the sole evidence linking the accused to the offence. No more than one in-custody informer should be used, even if others meet the test.

The policy creates the In-Custody Informer Assessment Committee, with a mandate to consider the proposed witness's evidence, his or her background and the application of the criteria set out therein to the case in question. The decision to call the in-custody informant as a witness will be made by the Committee. The police will be requested to conduct an investigation to assist in making a decision on the suitability of calling the in-custody informer as a witness. Prior to a decision being made, the in-custody informer must provide a videotaped statement in accordance with the decision of *R. v. K.G.B.*

Once a decision has been made by the Committee to either call or not call the informer as a witness, the Deputy Attorney General must be advised. He or she is required to maintain a registry of all decisions of the Committee.

If the Committee decides that an in-custody informer will be called to testify, the policy requires that additional information be disclosed to the defence in a timely fashion, including:

- the criminal record of the informer;
- the Manitoba Registry record of the informer, if any;
- particulars of any benefits, promises or undertakings between the informer and the State, including any written agreements to testify;
- any other known evidence attesting or diminishing the credibility of the informer, including any relevant medical or psychological reports accessible to the Crown, as well as all of the materials placed before the Committee, providing it is lawful to disclose them.

Where an in-custody informer has been approved to testify, the Department must enter into a written agreement with the informer to testify. Crown counsel must provide this agreement to the defence as part of the pre-trial disclosure and will seek to file it with the Court as an exhibit before the person testifies. If the agreement contemplates the conferring of a benefit on the informer, that benefit should be conferred before he or she testifies. No benefit must be conditional on the conviction of the accused. The informer must be clearly advised that any benefits are based on the understanding that the testimony provided in court is truthful. If the informer is charged with further offences prior to completing their testimony, the prosecutor must re-assess the future use of the informer as a witness for the Crown.

Where an in-custody informer has lied to the police, Crown or the court, he or she will be vigorously prosecuted by a counsel independent of the prosecution. If convicted of perjury or a similar offence, Crown counsel must ask for a significant consecutive term of imprisonment.

b) Ontario

The Ontario Ministry of the Attorney General responded to the *Morin Inquiry* by introducing new policies, educational programming and changes to operations, all aimed at further reducing the risk of wrongful conviction. The dangers presented by in-custody informers was targeted as a major area of reform, resulting in educational initiatives, a comprehensive Crown policy and the creation of the Ontario In-Custody Informer Committee in June of 1998.

Ontario's In-Custody Informer Committee Procedure

The use of in-custody informer evidence at trial[195] is contingent upon a stringent screening and vetting process prescribed by the Crown policy on in-custody informers. The screening process requires the Crown and police to conduct a rigorous and comprehensive analysis of the proposed in-custody informer's reliability as well the public interest factors weighing for and against the use of the informer's testimony. The policy sets out detailed criteria and principles to guide this analysis. If the Crown is still considering relying on the informer's evidence at trial after having applied the standards set out in the policy, the matter must be referred to the In-Custody Informer Committee.

The In-Custody Informer Committee consists of a Chairperson[196] and either two or four additional members, including the local Crown Attorney, one or two experienced trial or appellate Crown counsel from another region[197] and the Director of Crown Operations where the case is to be tried.[198] The trial Crown submits detailed materials to the Committee, including a written analysis of the informer's reliability as prescribed by the principles and criteria set out in the In-Custody Informer Policy. Once the materials are received, they are reviewed by the Committee and a date is set for a meeting with the trial Crown to discuss the proposed use of the informer.

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[195] The informer committee also screens in-custody informer evidence for potential use on sentencing. Where the Crown is considering relying on the evidence of an in-custody informer on a preliminary inquiry, Crown counsel must bring the matter to the attention of the regional Director of Crown Operations, who will determine whether it should be referred to the In-Custody Informer Committee for review prior to the commencement of the preliminary inquiry. The Committee will reassess the use of the informer after the preliminary inquiry.

[196] Appointed by the Assistant Deputy Attorney General.

[197] One counsel for a three-member Committee and two counsel for a five-member Committee.

[198] For a five-member Committee (almost all In-Custody Informer Committee reviews to date have been conducted by five-member Committees).

Generally, the trial Crown and Officer in Charge seeking to rely on the evidence of an in-custody informer will need to invest a significant amount of time[199] to prepare the materials for the In-Custody Informer Committee's review. Not only must comprehensive materials be collected to provide a solid foundation for a thorough consideration of the public interest in using the informer's evidence, but the Crown must also provide his or her own independent analysis of the informer's reliability and public interest criteria as set out in the Crown policy. As a result of this intensive preparation process, the trial Crown is well-acquainted with the dangers and issues relating to the potential use of in-custody informers well before the Committee actually meets.

The amount of preparation time for In-Custody Informer Committee members depends on the breadth of supporting materials submitted by the Crown. All cases considered by the Committee to date have been either attempted murder or murder cases with substantial briefs and materials. A very rough average of the amount of time required for Committee members to prepare each case is two to five days.

The In-Custody Informer Committee meeting is generally attended by the trial Crown and the officer in charge of the case. The case and the informer are reviewed and discussed in intensive detail, with a view to determining whether there is a compelling public interest in adducing the informer's evidence at trial. The decision includes, but is not limited to, analysis of numerous indicia of reliability itemized and described in the In-Custody Informer Policy, any consideration that the in-custody informer has been promised or received, safety issues, informer privilege and the strength of the Crown's case with or without the informer. After meeting with the trial Crown and officer in charge, the Committee will apply the Crown policy and make a final determination as to whether, at this juncture, there is a compelling public interest in calling the informer as a witness. The decision may always be reviewed if circumstances change.

Impact of the In-Custody Informer Committee on Ontario's Prosecution Service

Over time, the Committee procedure has evolved into a resource and support process for counsel prosecuting challenging cases. The trial Crown has a unique opportunity discuss the case and trial strategy with a group of highly experienced counsel. While collegial support is always welcome and available, the In-Custody Informer Committee is able to bring the additional perspective of counsel from outside the jurisdiction with expertise, not only in criminal prosecutions, but also in the risk factors for wrongful conviction. As a result, the In-Custody Informer Committee has developed from a novel entity regarded with some suspicion into a highly-respected sounding board for Crown counsel preparing for difficult and significant prosecutions.

Anecdotal information suggests that the principles and procedures introduced by the In-Custody Informer Policy and the Committee have filtered into the culture and consciousness of the Ontario prosecution service. Police and Crown counsel have become more proactive in assessing informer reliability and public interest factors in deciding whether to bring an application to the Committee in individual cases. As well, the presentation of cases to the Committee is demonstrating an increasingly keen awareness by Crown counsel of the risks of relying on informer evidence as well as the strategic considerations that might militate against using an informer even when the Committee gives its approval.

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[199] The actual amount of time will necessarily vary, depending on the case. This process has been known to take several months.

At a basic level, police and Crown counsel are aware that the preconditions to adducing informer evidence include a very substantial amount of preparatory work and a rigorous, intensive analytical process. In addition, the fundamental dangers associated with in-custody informer evidence are now extremely well understood within the Ontario prosecution system. The cumulative result is more sophisticated applications to the In-Custody Informer Committee and a greater degree of screening and vetting before applications are made to the Committee.

There has been some speculation by In-Custody Informer Committee members that potential informers have also begun to react to the new criteria for reliance on informer evidence. Although there is no empirical confirmatory information, there is a general sense that some informers are aware that there is a vetting process in place, or at least a higher and more complex threshold for using their evidence. Specifically, some members of the In-Custody Informer Committee have observed that some informers are making new and extra efforts to enhance their appearance of reliability in accordance with the criteria specified in the In-Custody Informer Policy. This phenomenon only serves to underscore the ingenuity of this sort of witness and the need for vigilance whenever the use of informer evidence is contemplated.

Future Directions in Ontario

The In-Custody Informer Committee has assumed a vital and dynamic role in the preparation of cases where an in-custody informer's evidence may be relied upon. Although it represents only one component of a more comprehensive strategy to educate Crown counsel regarding the dangers of these witnesses, the Committee continues to contribute significantly to the prosecution service's sensitivity to the systemic risk factors for wrongful conviction and the sophistication of individual Crown counsel's preparation for cases in which an in-custody informer has come forward.[200]

To date, membership in the Committee has generally been confined to those with substantial expertise, not only in the prosecution of serious cases but also in the systemic causes of wrongful conviction. It is hoped that the pool of counsel with the necessary degree of expertise can be broadened, both to maintain the health and vigour of the Committee but also to continue to perpetuate awareness of the legal and other factors that can contribute to wrongful conviction.

In addition, the In-Custody Informer Policy and In-Custody Informer Committee procedures will be periodically reviewed and updated in accordance with jurisprudential analysis, systemic change and lessons learned.

c) New Brunswick

In March 2003, the Department of Justice in New Brunswick issued a guideline on "Public Interest Agreements," which includes a section on in-custody informants. It reads as follows:

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[200] While not mandatory, an In-Custody Informer Committee review is also available to Crown counsel who are contemplating reliance upon an unsavoury witness who is not technically an in-custody informer.

Special Problem of In-Custody Informant Witness

> Definition: An in-custody informant witness is one who allegedly receives a statement from an accused while both are in custody, where the statement relates to an offence that occurred outside of the institution, and who does not have direct knowledge of the offence independent of the alleged statement of the accused. The accused need not be in custody for, or charged with, the offence that occurred outside of the institution.
>
> A difficult decision for a Crown Prosecutor to make is whether to rely on the evidence of an in-custody informant. The decision has become more difficult in light of recent cases of unlawful conviction, especially the case of *Morin* in Ontario leading to the *Morin Inquiry* and other recent high profile in-custody informant cases. The prevailing view based on experience is that the testimony of an in-custody informer is inherently suspect and that reliance on this type of evidence should be the exception, not the rule.
>
> The law presently does not support a trial judge determining by means of a *voir dire* whether the testimony should be presented to the jury. The traditional approach is for the jury to assess the reliability of a witness once properly instructed by the trial judge. Proper instruction in regards to an in-custody informant as witness may include a *Vetrovec* caution. Given the high propensity for harm in relying on an in-custody informant careful consideration must be given in making an assessment as to whether the in-custody informant should be called as witness for the Crown.

The policy guideline goes on to set out the decision process. Regional Crown Prosecutors, and Crown Prosecutors directly involved in the prosecution of a case under review where an immunity and/or benefit agreement is being considered, should not, for the purpose of negotiation of an agreement, have direct dealings with any informant or in-custody informant. A comprehensive assessment of the potential testimony must be made before the advisability of proceeding with an informant as a witness can be determined. In a difficult case, it is preferable that the assessment be made by a Senior Crown Prosecutor from an office that *is not involved in the prosecution.* Appendix A of the policy guideline provides a specific check-list of issues to be considered in making an assessment as to whether an in-custody informant should be called as a witness. Upon receiving the Crown Prosecutor's assessment, the Regional Crown Prosecutor shall, after consultation with the Director of Public Prosecutions, prepare a recommendation and forward it to the Director.

If the Crown is prepared to ask a judge or jury to base a conviction on the evidence of an informant or in-custody informant, the Regional Crown Prosecutor must be satisfied that a thorough and exhaustive review of the informant has been undertaken, that the evidence is credible, and that the public interest consideration is compelling. In all cases, the standard to be met is that it is reasonable to anticipate that the decision is not likely to bring the administration of justice into disrepute.

d) Alberta

On July 5, 1999, the Honourable Dave Hancock, Minister of Justice and Attorney General, released a policy guideline on the use of in-custody informant evidence in Alberta. The guideline states that in-custody informant evidence should only be adduced where there is a compelling public interest in doing so and after the matter has been thoroughly reviewed.

The guideline sets out principles to consider in determining whether there is a compelling interest in relying on the evidence of an in-custody informer. The policy also contains information and instructions on the following topics: Restrictions in Dealing with In-Custody Informers (informer privilege, independent legal advice, safety/security issues, consideration, negotiating with in-custody informers); Assessing the Reliability of an In-Custody Informer as a Witness, In-Custody Informer Review by an Outside Director, Materials to be Submitted to and Considered in a Review [by the Outside Director], the Decision of the Outside Director or the Assistant Deputy Minister, Agreements with In-Custody Informers, Disclosure Respecting In-Custody Informers as Witnesses, and Prosecution of Informer for Giving False Statements.

With respect to review by an Outside Director, the policy states:

> In every case, the decision to use an in-custody informer *shall* be referred by the Director responsible for the case to an Outside Criminal Justice Director. The Outside Director will decide if there is compelling public interest in presenting the evidence of the in-custody informer. In the event of disagreement, the matter shall be referred to the Assistant Deputy Minister, Criminal Justice Division for decision.

e) Newfoundland and Labrador

Newfoundland and Labrador has also included instructions with respect to the use of in-custody informant evidence in its Crown Policy Manual. It states:

> An *"in-custody informant"* is a person who indicates that while he or she and the accused were in custody, the accused made a statement concerning an offence.
>
> Prior to the Crown calling such a witness to testify the Senior Crown and the Director **must** be advised. The Crown Attorney conducting the trial **shall refrain** from being involved in any negotiation with the informant. The Crown Attorney **shall** request,

in writing, that the police provide the following type of information:

- does the witness have a criminal record?
- has the witness ever testified as an informant before?
- has the witness requested anything in exchange for his or her testimony?
- have the police offered or given the witness anything?
- how did the police become aware of the existence of the witness? and
- what contact have they had with the witness?

This material **must** be disclosed according to the guidelines set out in *R. v. Stinchcombe* and this policy manual. The Crown Attorney **must** inform the police that they should **not** offer the witness anything on our behalf such as withdrawal of charges, reduction of sentence, etc. without the approval of the Crown.

f) Nova Scotia

In 2002, Nova Scotia's Director of Public Prosecutions issued a Directive, patterned on the Ontario policy and incorporating many specific recommendations of the *Morin Inquiry*. It states that while the evidence of an in-custody informer is admissible in court and can properly form part of the case for the Crown, "it should only be adduced at trial where there are sufficient indicia of reliability and a compelling public interest in doing so." The Directive then spells out 10 principles to be considered in determining whether such a compelling public interest exists. Prosecutorial discretion may only be exercised in favor of adducing the evidence of the in-custody informer where the In-Custody Informer Committee has determined, by a majority of 4 out of 5, that there is a compelling public interest in doing so.

The Directive reminds prosecutors of their "heavy onus" to make complete disclosure about the in-custody informer. Prosecutors should ensure that any agreements made with in-custody informers relating to consideration in exchange for information or evidence are fully documented, in writing and in clear language. The prosecutor dealing with an informer should generally not be the prosecutor who will conduct the case and should ensure that the informer is aware of the advisability of seeking independent legal advice.

VI. RECOMMENDATIONS

Best practices in dealing with in-custody informers must be rigorous enough to protect the administration of justice from false testimony but sufficiently flexible to prevent the arbitrary exclusion of relevant and reliable evidence. It is well known that in-custody informers are often most proficient at presenting information that has the appearance of reliability. Experience has demonstrated that many skilled, fair and well-meaning police and prosecutors have fallen prey to self-serving and manipulative informers. Compounding the problem, defence counsel and judges have not always been armed with sufficient information to adequately inoculate juries against the inherent unreliability of these types of witnesses.

Accordingly, policies and practices aimed at reducing the risk of in-custody informers precipitating wrongful convictions must cut across the entire justice system. Police, prosecutors, defence counsel and the bench must have access to effective educational programming and information about the connections between in-custody informer evidence and the potential for a wrongful conviction. In addition, specific policies and operational protocols need to be created to assist, support and guide police, prosecutors and correctional officials in their dealings with in-custody informers.

The specific features of in-custody informer educational programming, policy and protocol should be tailored to reflect the unique characteristics and needs of different jurisdictions within Canada. Nevertheless, there are some common factors that should be consistently present, including:

- Educational programming should be provided to all justice professionals who are likely to encounter in-custody informers. Moreover, education in this area should be offered on a recurring basis, and address not only jurisprudential developments but other aspects of in-custody informer tactics and the damage that false evidence can cause.

- Educational materials, ideally in the form of policy guidelines, should be available to police and prosecutors. These materials should highlight the risks of wrongful conviction associated with in-custody informers and the factors that contribute to their unreliability.

- Crown policy standards should be instituted for the screening, vetting and limiting the use of in-custody informer evidence. These standards should apply not only to evidence adduced at trial but also to in-custody informer testimony at preliminary inquiries, pre-trial motions and sentencing hearings.

- An In-Custody Informer Committee, comprised of senior prosecutors with no connection to the particular prosecution, should be established to screen potential in-custody informers in any given case. The In-Custody Informer Committee should assess each case according to rigorous criteria designed to test the reliability of the in-custody informer's evidence and determine whether, ultimately, there is a compelling public interest in relying on informer information.

- The In-Custody Informer Committee should re-evaluate the use of the in-custody informer's evidence or information in the event of any relevant, material change in circumstances, such as new charges, additional requests for consideration, recantation or other developments in the case.

- Prosecutors must ensure that in-custody informers have access to independent legal advice with respect to the operation and waiver of informer privilege.

- Any prosecutor involved in negotiating consideration with an in-custody informer should generally not be the one to tender the informer's evidence in court.

- Any agreements made with in-custody informers relating to consideration in exchange for information or evidence should, absent exceptional circumstances, be reduced to writing and signed by a prosecutor (in consultation with the relevant police service/investigative agency), the informer, and his or her counsel (if represented). A fully recorded oral agreement may substitute for a written agreement.

- Prosecutorial policy guidelines must emphasize the need to ensure that disclosure in relation to in-custody informers is both full and fair. Ideally, prosecutors should be assisted by specific guidance itemizing the minimum standards for disclosure. As well, the ongoing nature of the disclosure obligation, particularly in relation to these types of witnesses, should be emphasized in educational programming and codified in prosecutorial policy.

- In-custody informers who give false evidence should be vigorously and diligently prosecuted in order to, among other things, deter like-minded members of the prison population.

- Each province should establish an in-custody informer registry so that police, prosecutors and defence counsel have access to information concerning prior testimonial involvement of in-custody informers. As a more long-term objective, the creation of a national in-custody informer registry should be considered. Repeated use of in-custody informers should be avoided.

VII. SUMMARY OF RECOMMENDATIONS

1. **Cross-sectoral educational programming should be provided to ensure that all justice professionals are aware of:**

    a) **the dangers associated with in-custody informer information and evidence;**
    b) **the factors affecting in-custody informer reliability;**
    c) **policies and procedures that must be employed to avoid the risk of wrongful convictions precipitated by in-custody informer information or evidence.**

2. **Policy guidelines should be developed to assist, support and limit the use of in-custody informer information and evidence by police and prosecutors.**

3. **Provincial in-custody informer registries should be established so that police, prosecutors and defence counsel have access to information concerning prior testimonial involvement of in-custody informers. The creation of a national in-custody informer registry should be considered as a long-term objective.**

4. **A committee of senior prosecutors unconnected with the case should review every proposed use of an in-custody informer. The in-custody informer should not be relied upon except where there is a compelling public interest in doing so. The In-Custody**

Informer Committee's assessment should take into account, among other things, factors affecting the reliability of the information or evidence proffered by the informer. That reliability assessment should, moreover, begin from the premise that informers are, by definition, unreliable. Any relevant material change in circumstances should be brought to the In-Custody Informer Committee's attention to determine whether the initial decision as to whether there was a compelling public interest in relying on the in-custody informer should be revisited.

5. **Any agreements made with in-custody informers relating to consideration in exchange for information or evidence should, absent exceptional circumstances, be reduced to writing and signed by a prosecutor (in consultation with the relevant police service/investigative agency), the informer, and his or her counsel (if represented). A fully recorded oral agreement may substitute for a written agreement.**

6. **In-custody informers who give false evidence should be vigorously and diligently prosecuted in order to, among other things, deter like-minded members of the prison population.**

CHAPTER 8 - DNA EVIDENCE

I. INTRODUCTION

DNA evidence constitutes circumstantial evidence used to identify the perpetrator of a serious crime by comparing the DNA profile of a suspect with the DNA profile of a bodily substance found at the crime scene or on or in something associated with the crime. It can provide compelling evidence linking a suspect to the crime. It is not in itself proof of guilt.

The development of DNA technology has helped to further the search for truth by assisting police and prosecutors in the fight against crime. Aided by use of DNA evidence, prosecutors are often able to establish the guilt of an accused person. At the same time, DNA has been instrumental in assisting in the search for truth by exonerating the innocent. In Canada, the wrongful conviction cases of David Milgaard and Guy Paul Morin provide powerful examples of how DNA evidence can be used to exonerate innocent people. DNA has also exonerated other people in Canada and in other countries who have been convicted of serious offences. The Innocence Project in New York has reported 143 such DNA exonerations to date, including several for people on death row.

II. CANADIAN COMMISSIONS OF INQUIRY

a) Commission on Proceedings Involving Guy Paul Morin

> **Recommendation 30 - Protocols for DNA testing**
>
> The Ministries of the Attorney General and the Solicitor General, in consultation with the forensic institutions in Ontario, the defence bar and other stakeholders in the administration of criminal justice, should establish protocols for DNA testing of original evidence.
>
> **Recommendation 31 - Revisions to Crown Policy Manual respecting testing**
>
> The Ministries of the Attorney General and Solicitor General should amend the Crown Policy Manual on physical scientific evidence to reflect that forensic material should be retained for replicate testing whenever practicable. Where forensic testing at the instance of the authorities is likely to consume or destroy the original evidence and thereby not permit replicate testing, the defence should be invited, where practicable, to observe the testing. Where defence representation is impracticable (or where no defendant is as yet identified), a full and complete record must be maintained of the testing process, to allow for as complete a review as possible.

Recommendation 32 - DNA data bank

> A national DNA data bank, as contemplated by Bill C-3, now before Parliament, is a commendable idea, proven in other jurisdictions, and it should be adopted in Canada.

Justice Kaufman noted that there was widespread support for the creation of a DNA data bank amongst the parties at the Inquiry. He stated that in his view such a data bank would be a useful investigative tool, both in identifying guilty parties and in excluding suspects. He did not comment upon the nuances of the legislation that was before Parliament at that time (Bill C-3, which is now the *DNA Identification Act*) as no submissions were directed to that issue. However, he made it clear that he supported the principle of such a data bank.

III. MACFARLANE PAPER

In his paper, Bruce MacFarlane Q.C. discussed unreliable scientific evidence, and recommended that microscopic hair comparison evidence be abandoned in favour of DNA testing on any matter of significance.[201]

MacFarlane further highlighted the value of DNA evidence when he noted that post-conviction DNA testing has been used to exonerate more than 127 persons in the United States and Canada.

IV. CREATION OF THE NATIONAL DNA DATABANK

In 1998, Parliament enacted Bill C-3, *An Act respecting DNA Identification and to make consequential amendments to the Criminal Code and other Acts* (S.C. 1998, c. 37). The legislation created the *DNA Identification Act*, which authorized the Solicitor General of Canada to establish a national DNA data bank maintained by the Commissioner of the RCMP. It also amended the *Criminal Code* to permit a judge to make a post-conviction DNA data bank order authorizing the taking of bodily substances from a person found guilty of designated *Criminal Code* offences in order to include the offender's DNA profile in the national DNA data bank.

The DNA data bank consists of two collections or indices of DNA profiles: a Crime Scene Index, containing DNA profiles derived from bodily substances found at a crime scene; and a Convicted Offenders Index, containing DNA profiles derived from bodily substances taken from offenders against whom post-conviction DNA data bank orders have been made. When a profile in the Convicted Offenders Index is found to match a profile in the Crime Scene Index, the police force investigating the crime in question is notified that there has been a match. Neither the profile nor the sample is revealed to the investigating force. Instead, the fact that a match was made may be used by the police to further investigate the offence. The match in the data bank will not, by itself, serve as evidence in criminal proceedings. Rather, the match can furnish the requisite grounds for the police to obtain a "DNA warrant" under s. 487.05 of the *Criminal Code*, authorizing the collection of a bodily substance directly from the suspect. The analysis of the DNA sample obtained by search warrant (as opposed to the DNA data bank sample) will constitute the evidence that is tendered at any ensuing trial.

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[201] p. 82.

The Supreme Court of Canada recently upheld the constitutionality of the DNA warrant scheme in *R. v. S.A.B.*,[202] ruling that the DNA warrant scheme strikes "an appropriate balance between the public interest in effective criminal law enforcement for serious offences, and the rights of individuals to control the release of personal information about themselves, as well as their right to dignity and physical integrity." The Court said that "[i]n light of the high probative value of forensic DNA analysis, the interests of the state override those of the individual. Forensic DNA analysis is capable of both identifying and eliminating suspects, a feature that seriously reduces the risk of wrongful convictions." The DNA data bank legislation is based on the same foundation as the warrant scheme.

In the three years since the National DNA data bank came into existence, it has made 2,136 offender hits (matching a crime scene to an offender) and 236 forensic hits (matching a crime scene to another crime scene). The data bank has received 63,878 samples in its Convicted Offender Index, and 16,236 in its Crime Scene Index.[203]

As the number of DNA samples in the National DNA data bank continues to increase, the chances of guilty parties being identified and held responsible for the crimes they commit will improve, and importantly, the likelihood of innocent persons being wrongly convicted will be reduced.

V. DNA - RELATED DEVELOPMENTS IN THE UNITED STATES

a) The *Innocence Protection Act of 2003*

In October 2003, The *Innocence Protection Act of 2003* was introduced in the U.S. Senate and House as Title III of the *Advancing Justice Through DNA Technology Act of 2003*. The *Innocence Protection Act* is a package of criminal justice reforms aimed at reducing the risk that innocent persons may be executed. Specifically, the bill would allow greater access to DNA testing by convicted offenders, and help states improve the quality of legal representation in capital cases. The U.S. House of Representatives overwhelmingly voted in favour of the Act on November 5, 2003.

The Act establishes rules and procedures governing applications for post-conviction DNA testing by inmates in the federal system. It states that a court shall order DNA testing if the applicant asserts under penalty of perjury that he or she is actually innocent of the qualifying offence, and the proposed DNA testing would produce new material evidence that supports such assertion and raise a reasonable probability that the applicant did not commit the offence. Penalties are established where the testing inculpates the applicant. Where the results are exculpatory, the Act states that the court shall grant the applicant's motion for a new trial or resentencing if the test results and other evidence establish by a preponderance of the evidence that a new trial would result in an acquittal.

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[202] [2003] S.C.J. No. 61.

[203] Statistics current as of August 23, 2004. Statistics are updated regularly at http://www.nddb-bndg.org/.

The Act would also prohibit the destruction of biological evidence in a federal case while a defendant remains incarcerated, absent a knowing and voluntary waiver by the defendant, or prior notification to the defendant, that the evidence may be destroyed.

The Act authorizes $25 million in federal grants over five years to help states defray the costs of such post-conviction DNA testing.

b) Study of the Use of DNA to Exonerate the Innocent

The use of DNA to exonerate innocent people has recently been the subject of a study in the United States. Specifically, the National Institute of Justice commissioned a research study of DNA exculpatory cases. The study was conducted by the Institute for Law and Justice; it identified 28 cases in which DNA testing led to the exoneration of persons previously convicted of murder or rape. The resulting report is entitled *Convicted by Juries, Exonerated by Science: Case Studies in the Use of DNA Evidence to Establish Innocence After Trial.*[204] This report, which reviews each of the 28 cases where an innocent person was exonerated through the use of DNA, contains commentaries written by prominent experts from a variety of disciplines in the United States. The following are a few excerpts from these commentaries discussing the importance of DNA:

- The introduction of DNA profiling has revolutionized forensic science and the criminal justice system. DNA technology has given police and the courts a means of identifying the perpetrators of rapes and murders with a very high degree of confidence.

  An unforeseen consequence of the introduction of DNA profiling has been the reopening of old cases. Persons convicted of murder and rape before DNA profiling became available have sought to have the evidence in their cases re-evaluated using this new technology. In some cases, DNA test results have exonerated those convicted of the offenses and resulted in their release from prison.[205]

- Post-conviction DNA exonerations provide a remarkable opportunity to re-examine, with greater insight than ever before, the strengths and weaknesses of our criminal justice system and how they bear on the all-important question of factual innocence. The dimensions of the factual innocence problem exceed the impressive number of postconviction DNA exonerations listed in this report. Indeed, there is a strong scientific basis for believing these matters represent just the tip of a very deep and disturbing iceberg of cases. Powerful proof for this proposition lies with an extraordinary set of data collected by the Federal Bureau of Investigation (FBI) since it began forensic DNA testing in 1989.

- Every year since 1989, in about 25 percent of the sexual assault cases referred to the FBI where results could be obtained (primarily by state and local law enforcement), the primary suspect has been excluded by forensic DNA testing. Specifically, FBI officials report that out of roughly 10,000 sexual assault cases since 1989, about 2,000 tests have been inconclusive (usually insufficient high molecular weight DNA to do testing), about 2,000 tests have excluded the primary suspect, and about 6,000 have "matched" or included the primary suspect. The fact that these percentages have remained constant for 7 years, and that the National Institute of Justice's informal survey of private laboratories reveals a strikingly similar 26 percent exclusion rate, strongly suggests that post-arrest and post-conviction DNA exonerations are tied to some strong, underlying systemic problems that generate erroneous accusations and convictions.[206]

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[204] Edward Connors, Thomas Lundregan, Neal Miller, and Tom McEwen (U.S. Department of Justice, Office of Justice Programs; National Institute of Justice: U.S., June 1996).

[205] Walter F. Rowe, Professor of Forensic Sciences at page xv.

VI. RECOMMENDATIONS

It is clear from the above commentaries, as well as our experience in Canada with the national DNA data bank, that DNA evidence is having an immense impact on the criminal justice system. There is great potential for reducing miscarriages of justice through the use of DNA evidence. The following recommendations would enhance the use and effectiveness of DNA evidence:

1. Promotion of DNA sampling

In the Canadian context, DNA sampling is not automatic upon conviction, rather judges order that DNA samples be taken based on criteria that include charge type, the criminal record of the offender and the best interests of the administration of justice. It is therefore recommended that strong policies and procedures for Crown counsel and police be implemented in all jurisdictions to ensure that the DNA data bank provisions are being used to their full potential.

2. Establishment of a Tracking System

In order to better understand the use and effectiveness of DNA in the criminal justice system, and to determine where improvements ought to be made, provincial tracking systems should be developed, with the ultimate goal of establishing a national tracking system. The results of a tracking system would indicate where gaps exist in the system and would provide a better sense of geographical differences in submissions to the data bank. For example, Alberta currently tracks DNA data bank orders in each of its Crown offices through the collection of statistics, which indicate whether a DNA data bank order was requested and whether it was granted or refused by the judge.

3. Education of Justice System Participants

The significance of the national DNA data bank to both convicting the guilty and exonerating the innocent should be included in any educational program for Crowns and police, and should be considered for inclusion in the National Judicial Institute curriculum for judges.

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[206] Peter Neufeld, Esq. and Barry C. Scheck, Professors of Law at page xxviii.

4. Implementation of Policies to Allow for Access to DNA for Independent Forensic Testing

As recommended by the *Morin Inquiry*, protocols and procedures should be developed by law enforcement agencies and justice departments to facilitate the release of forensic materials for independent testing upon the request of the defence. Ontario, for example, has amended its policy (written jointly with the Centre of Forensic Science) as follows, to ensure retention:

> ***Retention of evidence for replicate testing***
>
> The hallmark of scientific reliability is the ability to reproduce a result. Therefore, wherever practicable, and upon completion of all relevant examination, sufficient material should be retained to allow for replicate testing by the defence. In cases where the initial examination has been completed and further examination is likely to consume or destroy the sample, scientists are encouraged to consult with Crown counsel with carriage of the case before embarking on further testing. Where forensic testing is likely to consume or destroy all of the original sample, the scientist is encouraged to consult with Crown counsel who will seek defence cooperation in arranging for observation of the examination process. Where there is no defense representation at the testing, (or where no accused has yet been identified), a full and complete record of the testing process must be maintained. The record must then be disclosed to the defence. It is recognized, however, that any decisions affecting scientific examination must be subject to the general principle that delay may be detrimental to the examination and investigative processes.

5. Expansion of the DNA Data Bank

In light of the potential benefits of the use of DNA to exonerate the innocent, the expansion of the DNA data bank should be considered. Any expansion of the list of primary and secondary designated offences (offences that are eligible for DNA data bank orders) must take into account important *Charter* protections to ensure that individual rights and freedoms are respected in the collection and use of DNA information. The DNA data bank legislation is scheduled for review by Parliament in 2005; this may be an appropriate time to consider the expansion of the data bank.

In May, 2004, Justice Minister Irwin Cotler introduced a bill to make the National DNA Data Bank an even more effective investigative tool. Among the proposed amendments:

1. Adding certain *Criminal Code* offences, including criminal harassment, to the list of designated offences for which a DNA data bank order can be made;

2. Permitting a data bank order to be made against a person who has committed a designated offence but was also found not criminally responsible on account of mental disorder;
3. Expanding the list of sexual offences under the retroactive scheme (for persons convicted prior to June 30, 2000) by adding historical sexual offences like indecent assault, and the offence of break and enter and committing a sexual offence. A new class of offender would also be added to the list of offenders who may be candidates for the retroactive scheme: those who have committed one murder and one sexual assault at different times;
4. Creating the means to compel an offender to appear at a certain time and place to provide a DNA sample;
5. Creating a procedure for the review of DNA data bank orders that appear to have been made for a non-designated offence and the destruction of samples taken from these offenders.

The bill died with the call of the federal election.

6. Post-Conviction DNA Testing

While the issue of access to post-conviction DNA testing falls outside the mandate of the Working Group, it is recommended that this issue be considered and examined. Attention should be paid to issues such as triggering factors and cost.

VII. SUMMARY OF RECOMMENDATIONS

1. **Strong policies and procedures for Crown counsel should be implemented in all jurisdictions to ensure that the DNA data bank provisions are being used to their full potential.**

2. **Provincial tracking systems should be developed to better understand the use and effectiveness of DNA in the criminal justice system, with the ultimate goal of establishing a national tracking system.**

3. **The significance of the national DNA data bank to both convicting the guilty and preventing the conviction of the innocent should be included in any educational programs for Crowns and police and should be considered for inclusion in the National Judicial Institute curriculum for judges. A research package for Crowns on DNA data bank applications and the use of DNA evidence should be developed and kept current.**

4. **Protocols and procedures should be developed by law enforcement agencies and justice departments to facilitate the release of forensic materials for independent testing upon the request of the defence.**

5. **The expansion of the DNA data bank should be considered. Any expansion of the list of primary and secondary designated offences (offences that are eligible for DNA data**

bank orders) must take into account important *Charter* protections to ensure that individual rights and freedoms are respected in the collection and use of DNA information.

6. **The issue of access to post-conviction DNA testing should be studied.**

CHAPTER 9 - FORENSIC EVIDENCE AND EXPERT TESTIMONY

I. INTRODUCTION

Properly qualified and admissible expert testimony can be powerful evidence. It can identify a potential suspect to the exclusion of all others. It is a significant assistance to the trier of fact in appreciating specific facts and circumstances in a prosecution that are outside of its general knowledge and understanding. On the other hand, tainted, tailored and unsubstantiated expert evidence, couched in scientific terms and language, based on unreliable fact and ultimately debunked science has long been recognized as a leading cause of wrongful convictions.[207] Following on the heels of recent public inquiries, judicial pronouncements and interventions by advocacy groups, the current trend is:

- The admission of expert evidence depends on its relevance to a fact in issue, the necessity to assist the trier of fact on exceptional issues that require special knowledge outside their normal experience, the absence of any exclusionary rules and the proper qualifications of the expert;
- Judges maintain their duty as "gatekeepers" to prevent the distortion of the fact-finding process by excluding the admission of inappropriate and unnecessary expert testimony;
- The ultimate role of the trier of fact is not to be usurped by expert evidence;
- Appropriate and non-misleading language be used in reporting forensic conclusions; and
- Forensic evaluation services no longer be the exclusive domain of the state.

Expert evidence has traditionally been admitted as an exception to the rule against opinion evidence, to assist the trier of fact to understand and rule on complex and technical issues that may be above the general level of knowledge. The basic underlying premise of expert scientific evidence is that the opinion to be considered by the trier of fact given by someone with special knowledge and training is the result of disinterested, objective and scientifically sound reasoning. However, some expert opinions can present difficulties to the trial process. Sometimes, it appears the experts are not terribly impartial. Some are far from expert. On occasion, their evidence may be seen as virtually infallible, having more weight than it deserves, with the result that the evidence distorts the normal fact-finding process at trial. Finally, sometimes objective sciences such as DNA later show that the opinions tendered in evidence were simply wrong.[208]

II. CANADIAN COMMISSIONS OF INQUIRY

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[207] For example, as a result of concerns raised on the propriety of particular expert opinions, on April 23, 2003, the Deputy Attorney General of Manitoba announced the establishment of an advisory committee to examine criminal cases prosecuted in Manitoba where the Crown relied upon certain types of forensic evidence.

[208] See MacFarlane, at page 55. MacFarlane details the case of Fred S. Zain, a Serologist and State Trooper employed within the Serology Division of the West Virginia State Police Crime Laboratory. A judicial inquiry uncovered a massive fraud involving over one hundred and thirty four (134) of Zain's court cases resulting in seemingly endless post-conviction *habeas corpus* proceedings that will extend well beyond Zain's death in 2002.

Among the primary focuses of the *Morin* and *Sophonow Inquiries* were the mishandling and improper testing of forensic evidence, reliance on unreliable scientific data and the tainted expert opinion testimony.

a) The Commission on Proceedings Involving Guy Paul Morin

> **Recommendation 2 - Admissibility of hair comparison evidence**
>
> Trial judges should undertake a more critical analysis of the admissibility of hair comparison evidence as circumstantial evidence of guilt. Evidence that shows only that an accused cannot be excluded as the donor of an unknown hair (or only that an accused may or may not have been the donor) is unlikely to have sufficient probative value to justify its reception at a criminal trial as circumstantial evidence of guilt.
>
> **Recommendation 3 - Admissibility of fibre comparison evidence**
>
> Evidence of forensic fibre comparisons may or may not have sufficient probative value to justify its reception at a criminal trial as circumstantial evidence of the accused's guilt. However, the limitations upon the inferences to be reliably drawn from forensic fibre comparisons need be better appreciated by judges, police, Crown and defence counsel. This requires better education of all parties, improved communication of forensic evidence and its limitations in and out of court, in written reports and orally.
>
> **Recommendation 4 - Admissibility of preliminary tests as evidence of guilt**
>
> Evidence of a preliminary test, such as an 'indication of blood,' does not have sufficient probative value to justify its reception at a criminal trial as circumstantial evidence of guilt.
>
> **Recommendation 5 - Trial judge's instructions on science**
>
> Where hair and fibre comparison evidence or other scientific evidence is tendered as evidence of guilt, the trial judge would be well advised to instruct the jury not to be overwhelmed by any aura of scientific authority or infallibility associated with the evidence and to clearly articulate for the jury the limitations upon the findings made by the experts. In the context of scientific evidence, it is of particular importance that the trial judge ensure that counsel, when addressing the jury, do not misuse the evidence, but

present it to the Court with no more and no less than its legitimate force and effect.

Recommendation 6 - Forensic opinions to be acted upon only when in writing

a) No police officer or Crown counsel should take action affecting an accused or a potential accused based upon representations made by a forensic scientist which are not recorded in writing, unless it is impracticable to await a written record. Where a written record is not obtained prior to such action, it should be obtained as soon thereafter as is practicable.

b) The Crown Policy Manual and the Durham Regional Police Service operations manual should be amended to reflect this approach. The Ministry of the Solicitor General should facilitate the creation of a similar policy for all Ontario police forces.

c) Where a written record is only obtained after such action, and it reveals that the authorities acted upon a misapprehension of the available forensic evidence, police and prosecutors should be mindful of their obligation to take corrective action, depending upon the original action taken. Corrective action would, for example, include the immediate disclosure of the written record to the defence and, if requested, to the Court, where the forensic evidence has been misrepresented (even inadvertently) in Court. It would also include the re-assessment of any actions done in reliance upon misapprehended evidence.

Recommendation 7 - Written policy for forensic reports

The Centre of Forensic Sciences (CFS) should establish a written policy on the form and content of reports issued by its analysts. The Centre should draw upon the work done by forensic agencies elsewhere and the input of other stakeholders in the administration of criminal justice who will be receiving and acting upon these reports. In addition to other essential components, these reports must contain the conclusions drawn from the forensic testing and the limitations to be placed upon those conclusions.

Recommendation 8 - The use of appropriate forensic language

The Centre of Forensic Sciences should endeavour to establish a policy for the use of certain uniform language which is not potentially misleading and which enhances understanding. This policy should draw upon the work done by forensic agencies or working groups elsewhere and the input of other stakeholders in the administration of criminal justice. This policy should be made public.

Recommendation 9 - Specific language to be avoided by forensic scientists

More specifically, certain language is demonstrably misleading in the context of certain forensic disciplines. The terms 'match' and 'consistent with' used in the context of forensic hair and fibre comparisons are examples of potentially misleading language. CFS employees should be instructed to avoid demonstrably misleading language.

Recommendation 10 - Specific language to be adopted

Certain language enhances understanding and more clearly reflects the limitations upon scientific findings. For example, some scientists state that an item 'may or may not' have originated from a particular person or object. This language is preferable to a statement that an item 'could have' originated from that person or object, not only because the limitations are clearer, but also because the same conclusion is expressed in more neutral terms.

Recommendation 11 - The scientific method

The 'scientific method' means that scientists are to work to vigorously challenge or disprove a hypothesis, rather than to prove one. Forensic scientists at the Centre should be instructed to adopt this approach, particularly in connection with a hypothesis that a suspect or accused is forensically linked to the crime.

Recommendation 12 - Policy respecting correction of misinterpreted forensic evidence

A forensic scientist may leave the witness stand concerned that his or her evidence is being misinterpreted or that a misperception has been left about the conclusions which can be drawn or the limitations upon those conclusions. An obligation should be placed on the expert to ensure that these concerns are communicated as soon as possible to Crown or defence counsel. Where communicated to Crown counsel, an immediate disclosure obligation is triggered. The Crown Policy Manual and the Centre's policies should be amended to reflect these obligations. The Centre's employees should be trained to adhere to this policy.

Recommendation 13 - Policy respecting documentation of contacts with third parties

a) The Centre of Forensic Sciences should establish a written policy requiring its analysts and technicians to record the substance of their contacts with police, prosecutors, defence counsel and non-Centre experts. This policy should regulate the form, content, preservation and storage of such records. Where such records are referable to the work done on a criminal case, they must be located within the file(s) respecting that criminal case (or their location clearly noted in that file).

b) The Centre of Forensic Sciences should ensure that all employees are trained to comply with the recording policies.

Recommendation 14 - Policy respecting documentation of work performed

a) The Centre of Forensic Sciences should establish written policies regulating the content of records kept by analysts and technicians of the work done at the Centre. In the least, these policies must ensure that the records identify the precise work done, when it was done, by whom it was done and the identity of any others who assisted, or were present as observers when the work was performed. The policy should also regulate the retention period and location of these records. All records referable to the work done on a criminal case must be located within the file(s) respecting that criminal case (or their location clearly noted in that file).

b) The Centre of Forensic Sciences should ensure that all employees are trained to comply with the recording policies.

Recommendation 15 - Documentation of Contamination

a) Where in-house contamination is discovered or suspected by the Centre of Forensic Sciences, the contamination should be fully investigated in a timely manner. The contamination and its investigation should be fully documented. A copy of such documentation should be placed in any case file to which the contamination may relate. The matter should immediately be brought to the attention of the Director, the Quality Assurance Unit and the relevant Crown counsel. The Centre's written policies should reflect these requirements.

b) The Centre of Forensic Sciences should also reflect, in its written policies, the protocols to be followed by its employees to prevent the contamination of original evidence.

c) The Centre of Forensic Sciences should ensure that its employees are regularly trained to comply with the policies reflected in this recommendation.

Recommendation 16 - Documentation of Lost Evidence

Where original evidence in the possession of the Centre of Forensic Sciences is lost, the loss should be fully investigated in a timely manner. The loss and its investigation should be fully documented. A copy of such documentation should be placed in any case file to which the original evidence relates. The matter should immediately be brought to the attention of the Director, the Quality Assurance Unit and the relevant Crown counsel. The Centre's written policies should reflect these requirements. In this context, original evidence extends to work notes, communication logs or other material which is subject to disclosure.

Recommendation 17 - Reciprocal disclosure

Reciprocal disclosure of expert evidence should be established. The defence should be obliged to disclose to the Crown in a timely manner the names of any expert witnesses it intends to call as witnesses, along with an outline of the witnesses' evidence.

Recommendation 18 - Joint education on forensic issues

The Centre of Forensic Sciences, the Criminal Lawyers' Association, the Ontario Crown Attorneys' Association and the Ministry of the Attorney General should establish some joint educational programming on forensic issues to enhance understanding of the forensic issues and better communication, liaison and understanding between the parties. The Government of Ontario should provide funding assistance to enable this programming.

Recommendation 19 - Creation of an Advisory Board to the Centre of Forensic Sciences

An advisory board to the Centre of Forensic Sciences should be established consisting of Crown and defence counsel, police, judiciary, scientists and laypersons. It should be created by statute.

Recommendation 20 - Quality Assurance Unit

a) The recent establishment of a quality assurance unit by the Centre is to be commended. The unit's staffing and mandate should be reflected in written policies. Dedicated funds should be allocated to the quality assurance unit, adequate to implement this recommendation. The unit's budget should be insulated from erosion for operational use elsewhere.

b) The unit should consist of at least seven full time members. The Centre should be encouraged to hire at least half of the unit's members from outside the Centre. At least one member of the unit should have training in biology.

c) The unit should include a training officer, responsible for internal and external training.

d) The unit should include a standards officer, responsible for writing, or overseeing the writing of policies.

Recommendation 21 - Protocols respecting complaints to the Centre of Forensic Sciences

a) In consultation with the advisory board, the Centre should establish, through written protocols, a mechanism to respond to, investigate and act upon complaints or concerns expressed by the judiciary, Crown and defence counsel, or police officers. The protocols should identify the person(s) to whom a complaint or concern should be directed, how it should be investigated and by whom, to whom the results should be reported and what actions are available to the Centre at the conclusion of the process.

b) Trial and appellate judges should be encouraged by the Centre, through correspondence directed to the Chief Justice of Ontario, the Chief Justice of the Ontario Court of Justice (General Division), and the Chief Judge of the Ontario Court of Justice (Provincial Division) to draw to the Director's attention, in writing, any concerns about testimony given by the Centre's scientists. Judges should be encouraged by the Centre to identify judgments, rulings or comments made by the Court in instructing the jury which are relevant in this regard. Transcripts should generally be obtained by the Centre of the relevant judicial comments, together with the witness' testimony.

c) The Crown Policy Manual should be amended to provide that Crown counsel should draw to the Centre's attention such concerns, together with such particulars that will enable the matter to be investigated by the Centre. This policy should be encouraged through correspondence directed to the Ontario Crown Attorneys' Association.

d) The private bar should be encouraged by the Centre, through correspondence directed to relevant organizations, including the Criminal Lawyers' Association and the Canadian Bar Association — Ontario, to draw to the Centre's attention such concerns, together with such particulars that will enable the matter to be investigated by the Centre.

e) Police officers should be encouraged by the Centre, through correspondence directed to relevant police forces, or through the Ministry of the Solicitor General, to draw to the Centre's attention such concerns, together with such particulars that will enable the matter to be investigated by the Centre.

Recommendation 22 - Post-Trial Conferencing

The Centre of Forensic Sciences should establish a case conferencing process to assist in evaluating performance.

Recommendation 23 - Audits of the Centre of Forensic Sciences

The Centre of Forensic Sciences should, in consultation with its advisory board, engage an independent forensic scientist (or scientists) no later than October 1, 1998, to specifically evaluate the extent to which the failings identified by this Inquiry have been addressed and rectified by the Centre. The scientist's (or scientists') final report should be made public.

Recommendation 24 - Monitoring of Courtroom Testimony

The Centre of Forensic Sciences should more regularly monitor the courtroom testimony given by its employees. Monitoring should, where practicable, be done through personal attendance by peers or supervisors. Monitoring should exceed the minimum accreditation requirements. All scientists, regardless of seniority, should be monitored. Any concerns should be promptly taken up with the testifying scientist. The monitoring scientist should be instructed that any observed overstatement or misstatement of evidence triggers an immediate obligation to advise the appropriate trial counsel.

Recommendation 25 - Training of Centre of Forensic Sciences employees

The Centre of Forensic Sciences' training program should be broadened to include, in addition to mentoring components, formalized, ongoing programs to educate staff on a full range of issues: scientific methodology, continuity, note keeping, scientific developments, testimonial matters, independence and impartiality, report writing, the use of language, the scope and limitations upon findings, and ethics. This can only come with the appropriate allocation of funding dedicated to training.

Recommendation 26 - Proficiency testing

The Centre of Forensic Sciences should increase proficiency testing of its scientists. Efforts should be made to increase the use of blind and external proficiency testing for analysts. Proficiency testing should evaluate not only technical skills, but interpretive skills.

Recommendation 27 - Defence access to forensic work in confidence

a) The Centre of Forensic Sciences, in consultation with other stakeholders in the administration of criminal justice, should establish a protocol to facilitate the ability of the defence to obtain forensic work in confidence.

b) The Centre should facilitate the preparation of a registry of duly qualified, recognized, independent forensic experts. This registry should be accessible to all members of the legal profession.

Recommendation 28 - The Role of the Scientific Advisor

A 'scientific advisor,' contemplated by the Campbell mode, serves an important role and addresses concerns identified at this Inquiry. The use of a 'scientific advisor' should, therefore, be encouraged. There should be no prohibition upon the designation as scientific advisor of a forensic scientist who is directly involved in the forensic examinations associated with the case. This is impracticable. However, mindful of the concerns identified at this Inquiry, the CFS should encouraged, where practicable, to designate a scientific advisor who is not also the scientist whose own work is likely to be contentious at trial.

Recommendation 29 - Post-conviction retention of original evidence

The Ministries of the Attorney General and Solicitor General, in consultation with the defence bar and other stakeholders in the administration of criminal justice, should establish protocols for the post-conviction retention of original evidence in criminal cases.

Recommendation 30 - Protocols for DNA testing

The Ministries of the Attorney General and the Solicitor General, in consultation with the forensic institutions in Ontario, the defence bar and other stakeholders in the administration of criminal justice, should establish protocols for DNA testing of original evidence.

Recommendation 31 - Revisions to Crown Policy Manual respecting testing

The Ministries of the Attorney General and Solicitor General should amend the Crown Policy Manual on physical scientific evidence to reflect that forensic material should be retained for replicate testing whenever practicable. Where forensic testing at the instance of the authorities is likely to consume or destroy the original evidence and thereby not permit replicate testing, the defence should be invited, where practicable, to observe the testing. Where defence representation is impracticable (or where no defendant is as yet identified), a full and complete record must be maintained of the testing process, to allow for as complete a review as possible.

Recommendation 32 - DNA data bank

A national DNA data bank, as contemplated by Bill C-3, now before Parliament, is a commendable idea, proven in other jurisdictions, and it should be adopted in Canada.

Recommendation 33 - Backlog at the Centre of Forensic Sciences

> The Centre of Forensic Sciences should eliminate its backlog through increased use of overtime and an increased complement of scientists and technicians to enable it to provide timely forensic services. This can only come with the appropriate allocation of government funding specifically earmarked for this purpose.

Recommendation 34 - Forensic research and development

> The Centre of Forensic Sciences should dedicate resources to research and development. The Province of Ontario should provide adequate funding to implement this recommendation.

Recommendation 35 - Resource requirements

> The specific recommendations referable to the Centre of Forensic Sciences involve, by necessary implication, the infusion of additional financial resources into the Centre. It is imperative that such an infusion occur, to ensure that the Centre can serve a pre-eminent role as a provider of critical forensic services, that it can do so in an impartial, accurate and timely manner, and that future miscarriages of justice can thereby be avoided. In this context, miscarriages of justice include both the arrest and prosecution of the innocent, and the delayed or failed apprehension of the guilty.

b) The Inquiry Regarding Thomas Sophonow

- **POLICE NOTEBOOKS**

At the present time, officers, upon retiring or leaving the force, are required to keep their notebooks. This is unsatisfactory. At the Inquiry, evidence was given by conscientious officers that notebooks, which they kept in their homes after retirement, had been lost or irreparably damaged by fire or flood. This should not happen. The Municipality should be responsible for saving officers' notebooks. They should be kept preferably for 25 years, or at least 20 years, from the date that the officer leaves the force or retires. There are changes that occur in forensic science; witnesses emerge; or new physical evidence is discovered; and any of these elements may make a reinvestigation necessary. In those circumstances, the original notes would be of great importance. I realize that storage is a problem. However, the notebooks might be preserved by way of microfiche. In any event, storage should not become an insurmountable problem for the Police Service or the Municipality. The notes must be kept on file for the requisite time.

- **EXHIBITS** (whether filed in court or gathered in the course of the investigation)

These exhibits should also be stored for at least 20 years from the date of the last appeal or the expiry of the time to undertake that appeal. These should be preserved for the same reasons set out for the preservation of police notebooks. They should only be given to someone, such as an officer who investigated the crime, if a court order to that effect is obtained. Notice of such an application should be given to the Attorney General of the Province and to the accused. Exhibits should not be given to a police officer or former officer unless a court order has been obtained.

- **MATERIAL LINKING SUSPECTS TO A CRIME**

Whenever the police seek to link material at a crime scene to a particular geographic location or a specific manufacturer which, in turn, links a suspect to a crime, that material must be tested if a test can identify a specific location or manufacturer. The duty to perform the test lies with the prosecution, whether it be the police or the Crown. The failure to perform the test on the material in question constitutes a serious omission. As a consequence of that omission, evidence as to the material's location or provenance must be ruled inadmissible.

- **RAISING PREJUDICIAL ISSUES WITHOUT ADEQUATE EVIDENCE**

Crown Counsel should always maintain high standards of fairness in their role of prosecutor. That duty requires them to consider issues carefully and to exercise great restraint before raising an issue which will be highly prejudicial to the accused in situations where there is little evidence to support it. To do so may well result in an Appellate Court very properly finding that the trial was unfair.

III. MACFARLANE PAPER

Bruce MacFarlane Q.C., following an analysis of the perils of the reliance on unreliable forensic evidence and faulty expert opinion testimony, made the following recommendations:[209]

> The risk that scientific evidence may mislead a court has several dimensions. Organizationally, a forensic laboratory may be too closely linked with law enforcement and the investigative function, causing scientists to feel aligned with the police. The very nature of the proposed evidence (or its manner of presentation) may be so imprecise and speculative that whatever probative value it may have is significantly outweighed by its prejudicial effect. During the trial, defence counsel need the tools to test the accuracy and value of the evidence through an effective cross-examination. I will deal with each in turn.

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[209] pp. 82-83.

a) *Organizational Issues*

Forensic labs should be independent from the police. Ideally, that means an independent, stand-alone organization with its own management structure and budget. If located within a policing or law enforcement organization, it should minimally be segregated into a specific branch or division, with a separate management structure and budget, physically located away from investigative units.

b) *Reliability Issues*

- Microscopic hair comparison evidence should be abandoned in favour of DNA testing on any matter of significance.
- Expert evidence which advances a novel scientific theory or technique should be subject to special scrutiny by prosecutors and the judiciary to determine whether it meets a basic threshold of reliability, and whether it is essential in the sense that the trier of fact will be unable to come to a satisfactory conclusion without the assistance of an expert.
- Forensic experts should avoid language that is potentially misleading. Phrases such as "consistent with" and "match", especially in a context of hair and fiber comparisons, are apt to mislead. Other examples include the assertion that an item "could have" originated from a certain person or object – when, in fact, it may or may not have.

c) *Effective Cross-Examination*

During pre-trial disclosure, the defence will usually receive forensic reports outlining the tests that were performed and describing, in conclusive terms, the results reached. These are often inadequate for independent review.

- Defence counsel should be provided with the underlying raw data: the actual test results, notes, worksheets, photographs, spectrographs, and anything else that will facilitate a second, independent assessment.
- Defence counsel should be entitled to see the written correspondence and notes of telephone conversations between the investigators and the laboratory about the examination in question.
- Defence counsel should receive a description of any potentially exculpatory conclusions that reasonably arise

> from any testing procedures undertaken by the laboratory relied upon by the prosecution.

d) Preservation of Exhibits and Notebooks

> Increased anxiety over the possibility of wrongful convictions heightens the need to preserve key elements of a case for later review. At a minimum, in homicide cases, the prosecution and police file, exhibits tendered at trial, and evidence gathered but not used ought to be preserved for 20 years. Recently, DNA examination of a 24-year-old bodily sample has, in one fell swoop, both exonerated a convicted person in prison for 23 years (David Milgaard), and established the culpability of another (Larry Fisher).

These recommendations can be summarized into the following categories:

1. Forensic laboratories must be independent entities separated from control by police and prosecution;
2. Debunked forensic tests should not be relied upon in any form;
3. Forensic language should be standardized to avoid misleading conclusions which potentially overwhelm the trier of fact and distort the fact-finding process;
4. A database should be established to monitor the testimony of expert witnesses;
5. Novel scientific study or technique should be subject to special scrutiny before being admitted into evidence;
6. All inculpatory and exculpatory findings should be disclosed to the defence, including access to the raw data, the forensic laboratories and experts, and if possible, to the samples themselves to permit independent testing; and
7. Procedures and protocols should be established for the preservation of exhibits and notes to permit future testing for later reviews.

IV. CASE LAW

The Supreme Court of Canada dealt with the changing role of the expert witness and the impact of their opinion evidence in *R. vs. Mohan.*[210] In that case, the Court said the admission of expert evidence depends on the application of the following criteria:

1. relevance;
2. necessity in assisting the trier of fact;
3. absence of any exclusionary rule; and
4. a properly qualified expert.

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[210] [1994] 2 S.C.R. 9.

The Court also noted that expert evidence that advances a novel scientific theory or technique should be subject to special scrutiny to determine if it meets the basic threshold of reliability and necessity. Factors that will determine admissibility include:

1. whether it can be, and has been, tested;
2. whether it has been published and subjected to scrutiny or otherwise reviewed by other experts;
3. its known or potential error rate;
4. the existence of quality and control standards; and
5. whether there is acceptance within the relevant expert community.

The closer the evidence approaches an opinion on the ultimate issue, the stricter the application of the scrutiny.

The Court was also cognizant of the damage caused by unreliable scientific evidence:[211]

> Dressed up in scientific language which the jury does not easily understand and submitted through a witness of impressive antecedents, this evidence is apt to be accepted by the jury as being virtually infallible and as having more weight than it deserves.

In *R. vs. J.J.*,[212] the Court expanded on its cautions and pre-conditions to the admission of expert opinion evidence. The Court was cognizant of the "dramatic growth in frequency" with which expert witnesses were called to testify and the need to impose "suitable controls…and precautions" on unreliable science.[213] Furthermore, the Court re-emphasized its direction that the trial judge should assume the role of "gatekeeper" to ensure not only fairness to the parties to present "the most complete evidentiary record consistent with the rules of evidence," but to exclude expert evidence which may distort the fact-finding process. In reiterating the criteria to be applied by the trial judge in acting as gatekeeper, the Court accepted the criteria prescribed by the United States Supreme Court[214] which would be particularly helpful in evaluating the soundness of novel or newly developed and applied scientific techniques.

In *R. v. D.D.*[215] the Court held that mere helpfulness, or a finding that the evidence might reasonably assist the jury, is not enough to admit an expert's opinion. Such opinion evidence is only admissible if exceptional issues require special knowledge outside the experience of the trier of fact. The Court also noted that the dangers associated with opinion evidence are not eliminated by the governing rules of admissibility.

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[211] *Ibid.*, at par. 19.

[212] [2000] 2 S.C.R. 600.

[213] This is the first decision of the Supreme Court of Canada to use the phrase "junk science."

[214] *Daubert v. Merrill Dow Pharmaceuticals*, 509 U.S. 579 (1993).

[215] (2000), 148 C.C.C. (3d) 41 (S.C.C.).

As long as there is some admissible evidence to establish the foundation for the expert's opinion, the trial judge cannot instruct the jury to ignore the testimony. The trial judge must, however, warn the jury that the more the expert relies on facts not proved in evidence, the less weight the jury may attribute to the opinion.[216] The trier of fact can and must use good common sense in considering the value of expert evidence. It must consider the qualifications and impartiality of each expert. It must consider whether the evidence supports the assumptions upon which the opinion is based and it must consider the whole opinion itself.[217]

V. RECOMMENDATIONS AND GUIDELINES

In any given week, a prosecutor may be required to deal with a host of experts representing a diverse range of disciplines, such as: medical practitioners and pathologists, psychiatrists, psychologists, blood-alcohol analysts, traffic accident reconstruction analysts, forensic laboratory technicians, and fingerprint comparison analysts, to name a few. There is no question that over time and through experience, a prosecutor will develop a basic understanding in the areas of the regular expert witness. However, in an age of complex prosecutions, ever growing case loads and constraints on time and resources, the ability to remain current on significant developments and advances in these and other fields of expertise is limited. This is more apparent when new or novel areas of expertise arise and are to be relied upon in a specific prosecution.

Prosecutors would therefore benefit from seminars conducted by a variety of experts and incorporated in regular and ongoing education sessions. These sessions would be invaluable, as they would give prosecutors the opportunity, through direct contact and discussion, to receive more intensive training and insight into the various disciplines. These seminars could include:

- the fundamental role of the expert;
- explanation of the specific language or terminology used;
- the steps undertaken to reach an opinion;
- the certainty or qualifications on the opinion to be offered;
- how to handle the defence expert and in particular identification of new developments or advancements that may have an effect on future opinions and prosecutions; and
- proper techniques for the examination and cross-examination of the expert witness.

Besides the education sessions offered by individual prosecution services, prosecutors as a group would greatly benefit from the establishment of a centralized repository, which would catalog and collect all types of information and resources relative to experts. This repository, with access available to prosecutors from across the country, could include:

- case law;
- newsletters and articles;
- reliability of current techniques;

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[216] *Lavallee vs. The Queen*, (1990) 55 C.C.C. (3d) 97 (S.C.C.).

[217] *R. vs. Muchikekwanape* [2002] M.J. No. 253 (Man. C.A.).

- the latest developments and advancements in specific fields of expertise;
- sources of literature and study guides;
- directories of professional organizations from across the country (including criteria for the qualifications of specific experts);
- prosecution policies; and
- teaching aids.

A Web-based model could be developed to permit online access and regular updating of the information to maintain its currency. This is cost-efficient and would maintain a transparent and objective source of information. The cost of funding this repository could be shared between the federal and provincial governments and operated by the participating organizations. Accordingly, it is recommended that the Heads of Prosecutions Committee consider the feasibility of the creation of this national centralized repository.

Prosecutors should not shy away from the use and reliance on novel scientific technique or theory in the appropriate situation, providing there is a sufficient foundation to establish the reliability and necessity of these opinions and that its probative value does exceed its potential prejudicial effects. Noting the perils from the historical misuse of expert evidence, a prosecutor should be diligent in obtaining and adducing sufficient evidence to meet the factors in support of reliability (i.e. can the theory or technique be empirically validated? Is there a professional association or society offering continuing education to its recognized members? Is there a meaningful certification program? Can the findings be reliably recreated and tested by qualified examiners?) Above all else, the prosecutor must be satisfied that this evidence will be used for a proper purpose.

The issues of reliability and necessity apply with like force to expert evidence sought to be adduced by the defence. Prosecutors should be equally diligent in assessing the proposed defence evidence and oppose its introduction if does not meet the fundamental criteria for admission or if its effect would be to distort the fact-finding process.

In the final analysis, the key issues to be considered are:

1. The validity of the science;
2. The qualifications of the expert;
3. The quality and validity of the testing procedures;
4. The objectivity and independence of the opinion;
5. The proper evidentiary foundation being laid; and
6. Relevance to an issue in dispute.

Prosecutors must be reminded of the existence and effect of Section 657.3 of the *Criminal Code*. While this section does not involve the issue of the admissibility of expert evidence, it does however create a number of statutory obligations on the party which intends to tender or call this evidence at a proceeding. Any party to the proceeding who intends to call an expert to testify must, no later than 30 days before the hearing, give notice to the opposing party of this intention, together with the name of the witness, description of the area of expertise and a statement of qualifications of the expert. The prosecutor must, within a reasonable time before the hearing, provide the accused with a copy of any report prepared by the expert, or if no report was prepared, a summary of the opinion anticipated to be given. The accused is obligated to disclose to the prosecutor any report of its expert, or in absence of a report, a summary of the opinion to be given by the expert. That obligation does not arise until after the prosecution has closed its case. If there has not been compliance with these provisions, the court may grant the opposing party an adjournment to prepare for cross-examination of the expert, order disclosure of the report or summary and permit the recalling of other witnesses to respond to matters raised by this expert, unless it is deemed inappropriate to do so.

Expert opinions and testimony represent one form of circumstantial evidence that may be presented at trial. If due care and diligence is employed in the presentation of the opinion, with attention to the establishment of the sufficiency of the factual underpinning supporting it and with the fairness of the trial process in mind, the possibility of a miscarriage of justice arising from its use is significantly reduced.

VI. SUMMARY OF RECOMMENDATIONS

1. **Prosecutors should receive training on the proper use, examination and cross-examination of expert witnesses during ongoing and regular education sessions.**

2. **The Heads of Prosecutions Committee should consider the feasibility of establishing a national central repository to catalog and track, among others:**

- **case law;**
- **newsletters and articles;**
- **reliability of current techniques,**
- **the latest developments and advancements in specific fields of expertise;**
- **sources of literature and study guides;**
- **directories of professional organizations from across the country (including criteria for the qualifications of specific experts);**
- **prosecution policies;**
- **teaching aids.**

This applies to all Web-based models permitting online access to the data and regular updating of information to maintain currency.

3. **Prosecutors should not shy away from the use and reliance on novel scientific technique or theory in the appropriate situation providing there is a sufficient foundation to establish the reliability and necessity of these opinions and that the probative value does not exceed the potential prejudicial effects.**

4. **Prosecutors should be reminded of the existence of Section 657.3 of the *Criminal Code* and the requirements and reciprocal obligations of disclosure imposed on all parties to a proceeding intending to tender expert evidence at trial.**

CHAPTER 10 - EDUCATION

I. INTRODUCTION

The goal of educating justice system participants must be to proactively prevent miscarriages of justice. By educating Crowns, defence, police, members of the judiciary, forensic scientists and last but not least the public at large, we may be able to prevent wrongful convictions, thus promoting a strong, fair justice system and public confidence in the administration of justice. Indeed, the *Morin* and *Sophonow Inquiries* both identified the education of justice participants as a key aspect of any response to wrongful convictions and as a means to prevent them in the future.

As the preceding chapters have illustrated, there are some problems, themes and mistakes that arise time and again in documented cases of wrongful conviction. The frailties of eyewitness identification, "tunnel vision" on the part of police and Crowns, the use of jailhouse informants, and faulty forensic procedures are a few of the themes identified in various reports. These problems relate to the conduct of police, Crowns, defence lawyers and forensic scientists, and they are not confined to proceedings in the courtroom.

While many of the solutions and remedies identified in the various reports relate to specific areas, such as eyewitness identification and meticulous forensic science processes, it should be emphasized that overall attitudes and "culture" provide the milieu in which wrongful convictions can occur. Therefore, an effective education strategy must not only deal with specifics such as identification evidence and jailhouse informants, but should also provide information on the overall cultural attitudes that can develop in prosecution and investigation services. As culture and attitudes are often deeply ingrained, they can be difficult to change. Over time, and with the right kind of education and information, cultural and attitudinal changes can occur. In this regard, presentations not only by justice participants, but also by an interdisciplinary faculty including psychologists, criminologists and experts from other jurisdictions, will be invaluable.

When a miscarriage of justice occurs, it is not usually the result of one mistake, but rather, a combination of events. Therefore, just as the problems and errors are multi-layered, education must also be multi-faceted and directed at all of the participants in the justice system in order to be effective. Also, a fundamental understanding of the role of the Crown and the importance of fair and independent police investigations are two key ingredients that should be present in any education program dealing with the prevention of wrongful convictions.

Public confidence in the administration of justice is fostered by demonstrating that participants in the criminal justice system are willing to take action to prevent future miscarriages of justice. Any educational plan for the prevention of miscarriages of justice should include a public communication strategy to advise the public that the system is taking steps to prevent miscarriages of justice. It is also important to foster public understanding that fair, independent and impartial police investigations and Crown prosecutions are in the public interest.

The responsibility to prevent wrongful convictions falls on all participants in the criminal justice system. Police officers, Crown counsel, forensic scientist, judges and defence counsel all have a role to play in ensuring that innocent people are not convicted of crimes they did not commit. Education of these key players in the justice system is essential to the prevention of miscarriage of justice. This is an issue that does not touch on one single province or jurisdiction. The entire country would benefit from the development of a comprehensive education strategy with leadership from Ministries of the Attorney General, the Heads of Prosecutions Committee, the Canadian Association of Chiefs of Police and Chief Justices from across the country.

Educational programs are not without associated financial costs. While it is important to ensure that any educational plan be developed in a fiscally responsible manner, it is false economy to decide that education on the prevention of wrongful convictions is too expensive. Given the potential impact on individuals who are wrongfully convicted, the effect on public confidence in the administration of justice and the financial costs involved in commissions of inquiry and compensation, the Working Group believes the expenditure of public funds on these sorts of programs is well worthwhile.

II. CANADIAN COMMISSIONS OF INQUIRY

Both the *Morin* and *Sophonow Inquiries* identified the education of justice participants as a key aspect of a systemic response to the risk of wrongful conviction:

a) The Commission on Proceedings Involving Guy Paul Morin

> **Recommendation 18 - Joint education on forensic issues**
>
> The Centre of Forensic Sciences, the Criminal Lawyers' Association, the Ontario Crown Attorneys' Association and the Ministry of the Attorney General should establish some joint educational programming on forensic issues to enhance understanding of the forensic issues and better communication, liaison and understanding between the parties. The Government of Ontario should provide funding assistance to enable this programming.
>
> **Recommendation 48 - Post-conviction disclosure by Crown counsel**
>
> The Ministry of the Attorney General should remind Crown counsel of the positive and continuing obligation upon prosecutors to disclose potentially exculpatory material to the defence post-conviction, whether or not an appeal is pending. Such material should also be provided to the Crown Law Office.

Recommendation 49 - Post-conviction continuing disclosure by police

The Durham Regional Police Service should amend its operational manual to impose a positive and continuing obligation upon its officers to disclose potentially exculpatory material to the Durham Crown Attorney's Office, or directly to the Crown Law Office, post-conviction, whether or not an appeal is pending. The Ministry of the Solicitor General should facilitate the creation of a similar positive obligation upon all Ontario police forces.

Recommendation 60 - Crown education respecting informers

The Ministry of the Attorney General should commit financial and human resources to ensure that prosecutors are fully educated and trained as to in-custody informers. Such educational programming should fully familiarize all Crown attorneys with the Crown policies respecting in-custody informers and appropriate methods of dealing with, and assessing the reliability of, such informers.

Recommendation 61 - Police education respecting informers

Adequate financial and human resources should be committed to ensure that Durham Regional police officers are fully educated and trained as to in-custody informers. The Ministry of the Solicitor General should liaise with other Ontario police services to ensure that similar education is provided to police forces which are likely to deal with in-custody informers. Such educational programming should fully familiarize all investigators with the police protocols respecting in-custody informers and appropriate methods of dealing with, and investigating the reliability of, such informers.

Recommendation 72 - Skills, Training and Resources

1) Rank and file officers need be educated and trained on a continuing basis on a wide range of investigative skills. Their educators need themselves be fully trained in these skills and in their communication to others. Financial resources need be available, secure from erosion for operational purposes, to ensure that training for all Ontario police forces is state-of-the-art.

2) Attention should be given by the Government of Ontario, on a priority basis, to the specific concerns identified by the York Regional Police Association and the audit of the York Regional Police force. The Government of Ontario should publicly announce the measures being taken to address the concerns raised.

Recommendation 73 - Education respecting wrongful convictions

1) The Ministry of the Attorney General, in consultation with the Ontario Crown Attorneys' Association, should develop an educational program for prosecutors which specifically addresses the known or suspected causes of wrongful convictions and how prosecutors may contribute to their prevention. This program should draw upon the lessons learned at this Inquiry. Adequate financial resources should be committed to ensure the program's success and its availability for all Ontario prosecutors.

2) An educational program should be developed for police officers which specifically addresses the known or suspected causes of wrongful convictions and how police officers may contribute to their prevention.

3) The Ministry of the Solicitor General should take a leading role in promoting this programing. This program should draw upon the lessons learned at this Inquiry. Its design should be effected through the cooperative assistance of prosecutors and defence counsel. Adequate financial resources should be committed to ensure the program's success and its availability for all police investigators, both new and established.

4) The Criminal Lawyers' Association should develop an educational program for criminal defence counsel which specifically addresses the known or suspected causes of wrongful convictions and how defence counsel may contribute to their prevention. This program should draw upon the lessons learned at this Inquiry.

5) The Centre of Forensic Sciences should develop an educational program for its staff, including all scientists and technicians, which specifically addresses the role of science in miscarriages of justice, past and potential. This program should draw upon the lessons learned at this Inquiry. Its design should be effected through the cooperative assistance of prosecutors and defence counsel. Adequate financial resources should be committed to ensure the program's success and its availability for all Centre staff, both new and established.

6) Ontario law schools and the Law Society of Upper Canada, Bar Admission Course, should consider, as a component of education relating to criminal law or procedure, programming which specifically addresses the known or suspected causes of wrongful convictions and how they may be prevented.

7) The judiciary should consider whether an educational program should be developed which specifically addresses the known or suspected causes of wrongful convictions and how the judiciary may contribute to their prevention.

Recommendation 74 - Education respecting tunnel vision

One component of educational programming for police and Crown counsel should be the identification and avoidance of tunnel vision. In this context, tunnel vision means the single-minded and overly narrow focus on a particular investigative or prosecutorial theory, so as to unreasonably colour the evaluation of information received and one's conduct in response to that information.

Recommendation 75 - Crown discretion respecting potentially unreliable Evidence

The Ministry of the Attorney General should amend its policy guidelines to strongly reinforce that it is an appropriate exercise of prosecutorial discretion not to call evidence which is reasonably considered to be untrue or likely untrue. Similarly, it is an appropriate exercise of prosecutorial discretion to advise the trier of fact that evidence ought not to be relied upon by the trier of fact, in whole or in part, due to its inherent unreliability. The Ministry should take measures, including but not limited to further education and training of Crown counsel and their supervisors, to ensure strong institutional support for the exercise of such discretion.

Recommendation 76A - Overuse and misuse of consciousness of guilt and demeanour evidence

1) Purported evidence of 'consciousness of guilt' can be overused and misused. Crown counsel and the courts should adopt a cautious approach to the tendering and reception of this kind of evidence, which brings with it dangers which may be disproportionate to the probative value, if any, that it has. Crown counsel and police should also be educated as to the dangers associated with this kind of evidence. This

recommendation should not be read to suggest that such evidence should be prohibited.

2) Purported evidence of the accused's 'demeanour' as circumstantial evidence of guilt can be overused and misused. Crown counsel and the courts should adopt a cautious approach to the tendering and reception of this kind of evidence, which brings with it dangers which may be disproportionate to the probative value, if any, that it has. Crown counsel should be educated as to the merits of this cautionary approach and the dangers in too readily accepting and tendering such evidence. In particular, where such evidence of strange demeanour is brought forward after the accused is publicly identified, Crown counsel, the police and the judiciary should be alive to the danger that this 'soft evidence' may be coloured by the existing allegations against the accused. The most innocent conduct and demeanour may appear suspicious to those predisposed by other events to view it that way.

Recommendation 89 - Police culture and management style

Police forces across the province must endeavour to foster within their ranks a culture of policing which values honest and fair investigation of crime, and protection of the rights of all suspects and accused. Management must recognize that it is their responsibility to foster this culture. This must involve, in the least, ethical training for all police officers.

Recommendation 102 - Training respecting interviewing protocols

All Ontario investigators should be fully trained as to the techniques which enhance the reliability of witness statements and as to the techniques which detract from their reliability. This training should draw upon the lessons learned at this Inquiry. Financial and other resources must be provided to ensure that such training takes place.

Recommendation 106 - Crown education respecting interviewing Practices

The Ministry of the Attorney General should establish educational programming to better train Crown counsel about interviewing techniques on their part which enhance, rather than detract, from reliability. The Ministry may also reflect some of the desirable and undesirable practices in its Crown policy manual.

Recommendation 110 - Limitations upon criminal profiling

Police officers should be trained as to the appropriate use of, and limitations upon, criminal profiling. Undue reliance upon profiling can misdirect an investigation. Profiling once a suspect is identified can be misleading and dangerous, as the investigators' summary of relevant facts may be coloured by their suspicions. A profile may generate ideas for further investigation and, to that extent, it can be an investigative tool. But it is no substitute for a full and complete investigation, untainted by preconceptions or stereotypical thinking.

Recommendation 113 - Polygraph tests

1) Police officers should be trained as to the appropriate use of, and limitations upon, polygraph results. Undue reliance on polygraph results can misdirect an investigation. The polygraph is merely another investigative tool. Accordingly, it is no substitute for a full and complete investigation. Officers should be cautious about making decisions about the direction of a case exclusively based upon polygraph results.

2) The documentation respecting polygraph interviews, including any information provided to the examiner by the investigators or by the person examined, should be preserved until after the completion of any relevant court proceedings or ongoing investigations.

Recommendation 115 - Crown education on the limits of advocacy

Educational programming for Crown counsel should contain, as an essential component, clear guidance as to the limits of Crown advocacy, consistent with the role of Crown counsel. These issues may also be the subject of specific guidelines in the Crown policy manual or a Code of Conduct.

b) The Inquiry Regarding Thomas Sophonow

Tunnel vision

- I recommend that attendance annually at a lecture or a course on this subject be mandatory for all officers. The lecture or course should be updated annually and an officer should be required to attend before or during the first year that the officer works as a detective.

- Courses or lectures that illustrate with examples and discuss this problem should be compulsory for police officers and they would undoubtedly be helpful for counsel and judges as well.

Atmosphere of Suspicion as between Crown and Defence Bar

- It may seem trite but I recommend that regular meetings be held once or twice a year for the Crown and Defence bar. At those meetings, counsel on both sides could put forward their problems, discuss them and seek mutually satisfactory solutions to them. At some of these meetings, high-ranking police officers should attend and explain their position with regard to the issues raised. Some members of the judiciary and, perhaps, the media might be invited to attend occasionally so that all would be aware of the problems and could contribute to their solution. In that way, solutions satisfactory to all concerned could be reached. The entire administration of justice has too much at stake to permit any feelings of mistrust to fester and spread, thereby jeopardizing the ability of the courts to arrive at a fair and just result.

III. MACFARLANE PAPER

MacFarlane makes it clear that the reshaping of attitudes, practices and cultures within our the criminal justice system is critical to the fair functioning of the system. He specifically comments on educating and training justice system participants:[218]

> Prosecution agencies, judicial councils and defence associations should establish and regularly deliver training courses specifically designed to help prevent wrongful convictions. Templates presently exist. On March 27th, 2002, the Canadian Judicial Council voted unanimously to authorize the National Judicial Institute to create and deliver an intensive three day course to help Canadian Judges identify and counteract known and suspected causes of wrongful convictions. In the United States, the Innocence Project has developed a 13 part academic course on wrongful convictions for use in universities, colleges and law schools. Both Ontario and Manitoba have held similar seminars, the latter province hosting the "Jailhouse Confessions and Tunnel-vision Conference" in September, 1999.

MacFarlane notes that "[d]eeply rooted attitudes, practices and culture are difficult to change, but there are several specific initiatives, which, if undertaken well, can assist in a reshaping process over time." These specific initiatives include training on tunnel vision, avoiding the "game" theory of criminal prosecutions, fostering a culture of policing that values the honest and fair investigation of crime and the protection of the rights of all suspects and accused, and adherence to standards set by the International Association of Prosecutors.[219]

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[218] p. 78.

[219] pp. 78-79.

IV. PAST AND CURRENT EDUCATIONAL INITIATIVES IN CANADA

This non-exhaustive list briefly describes some of the more recent educational initiatives in this area:

- Ontario Criminal Lawyers Association (OCLA) - The issue of preventing wrongful convictions is a regular part of the association's educational program. The association has annual conferences and posts legal materials for their members on their website. The OCLA works co-operatively with the Association in Defence of the Wrongfully Convicted (AIDWYC).

- Ontario's New Assistant Crown Attorney Training, 1999 & 2000 - The hiring of a large number of Assistant Crown Attorneys led to the development of a special training course for new counsel. It covered a range of topics including the role of the Crown and the recommendations of the *Morin Inquiry*.

- The Law Society of Upper Canada – The bar admission course materials do not deal specifically with the issue of wrongful convictions but deal with the related issues of the role of counsel, the duty of fairness and the Crown's disclosure obligations.

- Osgoode Hall Law School Miscarriage of Justice Conference, May 16-17, 2002 – Hosted by the Innocence Project, the conference focused on the causes of, and remedies for, wrongful convictions and how to investigate a wrongful conviction.

- National Judicial Institute Conference for Judges, September 2002 - "Judicial Safeguards for the Prevention of Wrongful Convictions." A second course, "Frailties in the Criminal Justice Process: The Judge's Role," was held in December 2003.

- Ontario's Four Regional Fall Conferences 1998 - Joint Defence, Crown, Police, Forensic Sciences Conferences to deal with the recommendations of the *Morin Inquiry*.

- Manitoba's Fall 2002 Post-*Sophonow Inquiry* Conference – Joint Defence, Crown, and Judicial participation.

- AIDWYC (Association in Defence of the Wrongfully Convicted) Conference, fall 2002. Speakers included: advocates, defence counsel and wrongfully convicted individuals.

- The Innocence Project, in conjunction with the Center on Wrongful Convictions at Northwestern University and the national organization The Innocence Network, has developed a thirteen-part, academic course on wrongful convictions for use in undergraduate universities, graduate programs, junior colleges, and law schools. "Wrongful Convictions: Causes and Remedies" is an interdisciplinary examination of the principal problems that lead to the conviction of the innocent and the leading proposals for reform.[220] It can serve as a "core" offering for students participating in innocence projects at their schools or as a stand-alone course. The course is directed not only at future lawyers and journalists, but also at individuals training for careers in law enforcement, forensic science, corrections, criminology, psychology, and sociology.

- Canadian Law Schools - Many Canadian law schools are addressing the issue of wrongful convictions and the role of Crown counsel in their criminal law curricula. Some have specific courses on wrongful convictions and at Osgoode Hall, the Innocence project investigates real cases.

V. OPTIONS FOR EDUCATION VENUES AND TECHNIQUES

National Forum on the Prevention of Wrongful Convictions – Leadership by Ministries of the Attorney General/Heads of Prosecutions Committee/Canadian Association of Chiefs of Police

A strong commitment by leaders in the justice system across the country is required in order to implement effective educational programs that will assist in safeguarding against wrongful convictions. To this end, the Working Group believes a National Forum on the Prevention of Wrongful Convictions, with leadership from the Ministries of the Attorney General, Deputy Ministers, the Heads of Prosecutions Committee and Canadian Association of Chiefs of Police, should be convened. The objective of such a Forum would be to raise the profile of the issue and to send a message, not only to participants in the justice system but also to the public at large, that wrongful convictions will not be tolerated. It would demonstrate a strong national commitment to the issue and foster confidence in the administration of justice.

The Working Group believes a number of positive outcomes would result from the decision to hold a National Forum on the Prevention of Wrongful Convictions:

- The Forum could seek out best practices from across the country, and kick-start a national education campaign. By demonstrating leadership and support from key players at the highest levels, educational processes and programs will have a greater prospect of success.

- A National Forum will send an important signal to the community that police and prosecutors take the issue of wrongful convictions seriously, and are determined to take a leadership role in developing an action plan to prevent future wrongful convictions.

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[220] The course includes a fifteen-hour, 13-lecture, digital multimedia curriculum on CDs, produced by Houston attorney Sam Guiberson and presented by the nation's top experts on issues of innocence. Lecturers include Barry Scheck and Peter Neufeld of the Innocence Project on DNA testing and innocence, Professor Gary Wells on eyewitness identification evidence, Professor Michael Saks on junk forensic science, Stephen Bright of the Southern Centre for Human Rights on ineffective assistance of counsel, Professor Michael Radelet on innocence and the death penalty, and Bryan Stevenson of the Equal Justice Initiative of Alabama on innocence and race.

- A National Forum will assist in providing all justice sector participants with a clearer understanding of what their respective roles are in preventing wrongful convictions.

- A National Forum would provide an opportunity to bring in leading experts on wrongful convictions to help police, prosecutors and other justice system participants gain a better understanding of the causes of wrongful convictions, as well as the concrete measures that can be adopted to prevent them. It would also allow for the exchange of ideas and recommendations for the prevention of wrongful convictions on a national basis.

- A National Forum will ensure that all parts of the country will have access to education and training on preventing wrongful convictions. A National Forum will provide the economy of scale to permit smaller jurisdictions to fully participate in this important project.

- A National Forum could develop and promote a nation strategy to combat wrongful convictions, with regional educational conferences and programs to follow.

It is proposed that the Forum be co-sponsored by the Heads of Prosecutions Committee and the Canadian Association of Chiefs of Police. Close consultation with organizations such as the National Judicial Institute, Canadian Bar Association and Association in Defence of the Wrongly Convicted would be essential to the success of the Forum.

Subsequent to the writing of this report, the Manitoba government, in conjunction with the University of Manitoba, has begun to plan an international conference on wrongful convictions in Winnipeg in October 2005. A representative of the Working Group is on the organizing committee and the Working Group believes this conference can achieve the same objectives as the proposed National Forum and wholeheartedly supports the initiative.

Joint Educational Opportunities

Given the multi-faceted nature of the causes of wrongful convictions, a holistic approach to education, which involves joint conferences of Crowns, police, defence and forensic scientists, can provide an approach with all segments of the justice system working together to find solutions. This sort of collegiality can assist in breaking down barriers and foster goodwill between police, Crowns, defence and members of the judiciary. It can also promote a fuller understanding on the part of all parties of the roles of various justice participants. The following components of the joint educational conference should be considered:

- A joint police/Crown/defence conference could occur in various larger provinces, with the smaller provinces sending participants in person or by video links. Presentations could be made which cover topics of interests to Crowns, police, defence and forensic scientists - for example, evidence-gathering techniques, suspect forensic evidence, the usefulness of DNA evidence etc. Other sessions could focus on areas of interest that are specific to the individual participants - for example, specific issues related to forensic evidence.

- Local educational opportunities should be explored. The *Sophonow Inquiry* suggested some strategies to ameliorate what was described as the "atmosphere of suspicion as between Crown and defence." Justice Cory suggested the creation of bilateral committees at the local level.

Police Education Opportunities

Police services in Canada have been taking steps to address the topics raised in the various wrongful conviction inquiry reports.[221] For example, "Major Case Management" courses, covering investigative techniques, are now offered to police across the country. As well, audit panels have been set up to independently review major investigations. The following police education options should be considered to supplement and enhance the training that is currently being carried out:

- Due to the unique role of police, specialized conferences and educational materials should be developed. Some jurisdictions could hold a separate "wrongful convictions" conference for the police. In Ontario, for example, this could be sponsored by the Ontario Association of Chiefs of Police. Invitations could be extended to police services across Ontario and other jurisdictions, in order to allow for an exchange of ideas amongst police services and to provide smaller police services the benefit of such training.

- Training on wrongful convictions should be made a part of standard police college training; for example, it should be offered at the Ontario Police College, Canadian Police College and the RCMP Police Academy.

- Training should also be included as part of continuing education programs within local police services. Experienced officers and supervisors could benefit from continuing education in carrying out their own duties and also in becoming better equipped to review the actions of the officers who report to them. Crown Attorneys and the local defence bar could be present at these educational programs.

- The Canadian Association of Chiefs of Police annual conference should incorporate information sessions on wrongful convictions.

- Resources should be available to allow the police to attend external wrongful convictions conferences, such as the one by AIDWYC.

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[221] A survey conducted by CACP indicates that there is currently no direct training by police services on the issue of miscarriages of justice or wrongful convictions. However, there are several specialized courses being conducted by police services and police academies which incorporate and study some of the individual causes of wrongful convictions, with a particular emphasis on police-induced confessions in the context of courses on statement taking, or tunnel vision and eyewitness misidentification during major case management and general investigation courses. In February 2004, the Sûreté du Québec, the RCMP and the Québec police academy jointly hosted a conference on statement-taking which focused some of the discussions on police-induced confessions. In May 2004, a presentation was given by senior officers in the North West Region of the RCMP on the work done by the Working Group. This will become a permanent fixture in commissioned officer training for the Region.

The Canadian Police College has been a national trend setter for police training; it will therefore be important to involve the CPC in any future educational endeavours. The Ontario Ministry of the Attorney General and the Manitoba Department of Justice are also good resources to assist in developing agendas for the police. In 1998, in response to the *Morin Inquiry*, Ontario's Criminal Law Division put on a joint police/Crown conference on the prevention of wrongful convictions.

It must be stressed that increased police education on this topic will not only advance the important goal of preventing wrongful convictions, but by reinforcing proper investigative techniques, such training will also advance the equally crucial goal of ensuring that the guilty are convicted.

Crown Education Options

- Individual provinces should host Crown conferences on the prevention of wrongful convictions. Crowns from other jurisdictions could be invited to attend. This would allow for Crowns from smaller jurisdictions to benefit from education in this area. In addition, the use of video links with smaller jurisdictions could be explored.

- Prevention of wrongful convictions should be a standard part of continuing education programs for Crowns across the country. For example, Ontario has regular Crown Schools every summer and hosts two educational conferences annually, in addition to other educational opportunities. The Federal Prosecution Service holds an annual Prosecutors School in the fall. The prevention of wrongful convictions should be included in regular conference and course materials. In this way, Crowns will be reminded of the dangers of wrongful conviction and can have ongoing training as new issues arise.

- New prosecutors should be required to attend seminars on wrongful convictions. These seminars can be either included in regular office or regional meetings or in specific training for new Crowns. Ontario already provides new Crown training on the role of the Crown and other pertinent areas.

- Crowns should be encouraged to attend and participate in external wrongful conviction conferences.

- Each prosecution service should develop a comprehensive written plan for educating its Crown attorneys on the causes and prevention of wrongful convictions.

Judicial Information Sessions

- Building on the success of the National Judicial Institute's December 2002 and 2003 courses, judicial training sessions could incorporate updates on law relevant to miscarriages of justice.

- Several educational modules have been developed with the specific intent of educating members of the judiciary on how to prevent miscarriages of justice.

- Members of the judiciary could be invited to participate in panels at Crown, defence and police educational programs.

Canadian Law School Education Options

- Recommendation 73(e) of the *Morin Inquiry* suggested that Ontario law schools and the Bar Admission Course consider an educational component addressing known or suspected causes of wrongful convictions and their prevention.
- Many Canadian law schools are addressing the issue of wrongful convictions and the role of Crown counsel in their criminal law curricula. These should be expanded.

Bar Admission Course

Law societies across the country should develop and include in their curriculum an educational module dealing with the causes of, and ways of preventing, wrongful convictions.

Education Opportunities for the Defence Bar

- The issue of wrongful convictions should be a regular part of defence counsel's educational activities. The Ontario Criminal Lawyers Association hosts regular conferences and provides extensive legal resources to its members. Co-operation between defence counsel in smaller provinces with criminal lawyers associations in larger provinces should be encouraged.

- Defence counsel should be encouraged to attend external educational seminars on the causes of wrongful convictions and on the ways of preventing them. (AIDWYC and the Innocence Project are examples of external educational resources.)

- Defence counsel should be encouraged to participate in panel discussions at Crown educational conferences/seminars and invite Crown representatives to their educational events.

Possible Educational Techniques

There are a number of methods that could be used at various conferences to present information with respect to miscarriages of justice:

- Presentation of case studies of wrongful convictions and lessons learned (ie: Milgaard, Morin, Sophonow, Marshall etc.) This technique is important as it emphasizes that the problem of wrongful convictions is not just a matter of legal theory, but involves real people who have spent many years in prison before being ultimately exonerated.

- In the context of small group discussions, participants can identify problematic areas and tools to reduce the risk of wrongful convictions.

- Theory can be put into practice by developing practical exercises, such as role-playing, demonstrations of witness interviews, and conducting photo-lineups.

- On-line training for Crowns and police is another learning mechanism that should be considered.

- Educational materials/policies could be distributed on CD-ROM to provide inexpensive access and promote information sharing across the country. Both Ontario and Manitoba have Crown policies on a variety of areas that focus on the prevention of wrongful convictions. Ontario's policies include: The Role of the Crown, In-Custody Informers, Conduct of Witness Interviews, Physical Scientific Evidence and Conceding Appeals and Responding to Fresh Evidence Applications and Police/Crown Relationship. These materials can, and should be, shared across the country.

- Video-linked conferences would enable larger provinces to share resources with smaller provinces. Video conferences could also be useful for ongoing educational training.

- Psychologists, law professors and criminologists should be invited to take part in educational conferences. The involvement of experts from outside of the justice system is extremely important, given the need to shift and adjust attitudes and "culture."

- Guest Speakers: It is compelling to hear from the wrongfully convicted. One of the most compelling sessions at the AIDWYC conference was a panel of the wrongly convicted. Other guest speakers could include people such as Jennifer Thompson, a victim who wrongfully identified an individual as her rapist. She spoke at the first NJI course and at Justice Canada and is an accomplished speaker.[222]

- Regular newsletters could keep Canadians involved and updated on miscarriage of justice issues.

VI. DRAFT EDUCATIONAL AGENDA/TOPICS

Education modules for various participants in the justice system should be developed and modified depending on the exact audience of the forum. A list of topics has been compiled using reported causes of wrongful convictions identified in various reports and commissions. While many reports and academic papers have focused on immediate systemic failures relating to witness interviews, eyewitness identification, and disclosure of evidence, wrongful convictions often relate to a more fundamental issue - attitudes, practices and cultures within the criminal justice system. A clear understanding and delineation of the role of the Crown, police and forensic scientists is crucial to the prevention of wrongful convictions. In this context, while some of the topics proposed will relate to specific laws and procedures, others should provide a more fundamental understanding of the phenomenon of tunnel vision as well as the various roles and responsibilities within the criminal justice system. The topics recommended for consideration are the following:

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[222] Articles discussing Thompson's experience include: Mark Hansen, "Forensic Science: Scoping out Eyewitness Ids," 87 *A.B.A.J.* 39, April, 2001; Helen O'Neill (The Associated Press), "The Power of Faith / Eleven Years After Jennifer Thompson's Mistaken Identity Sent Him to Jail, Ronald Cotton's Spirit of Forgiveness Let Them Be Friends." Newsday (New York), Wednesday November 8, 2000, Part II; Page B06.

1) Role of the Crown and Attorney General

Education on the proper role of the Crown can usefully be conducted not only as part of Crown and police conferences, but also in joint conferences involving defence counsel. Ethical responsibilities of both defence and prosecution should be emphasized at law school and be re-emphasized in practice as a part of continuing legal education programs. Topics to be covered could include:

- Overzealous prosecution;
- Advocacy/cross-examination;
- Witness interviews; and
- Tunnel Vision.

2) Role of the Police

Within the police community there is a culture of honest and fair investigations that are open-minded. Training, both as part of joint sessions with Crowns and other justice participants, as well as other specific police training opportunities, should emphasize this.

3) Tunnel Vision

In order to combat the phenomenon of tunnel vision, proper investigation of alternative suspects by the police is required. A review of the tension between Crown independence and the concept of Crown/police "team" should be explored. Crowns must be fully aware of limits on advocacy, cross-examination and closing addresses.

4) Post-Offence Conduct and Demeanour Evidence

A number of appellate courts, including the Supreme Court of Canada, have been critical of the use of the term "consciousness of guilt" and have cautioned against the Crown using such terminology. Instead, "post offence conduct" or "evidence of conduct after-the-fact" should be employed. This concern was echoed in the *Morin Inquiry*. It is recommended that Crown counsel and police be educated on the dangers associated with consciousness of guilt and demeanour evidence.

5) Frailties of Eyewitness Identification

Ongoing police education should include the proper procedures to be used in dealing with identification witnesses. Protocols should be developed incorporating the recommendations in the *Morin* and *Sophonow Inquiries*. Education for Crown counsel should include the appropriate witness identification procedures and the factors that can affect the strength of an identification witness.

6) False Confessions

Police training should include material on the existence, causes and psychology of police-induced false confessions. Police should also receive training on the indicia of reliable and unreliable statements.

7) Witness Interviews

Police should receive training on the appropriate manner to conduct witness interviews. The effective prosecution of serious or sensitive cases often requires Crown counsel to also interview witnesses. Crown counsel should be educated on proper interview techniques to avoid unintentionally influencing a witness to change his or her evidence to accommodate the prosecution theory.

8) Alibi Evidence

Alibi evidence was a factor in the *Sophonow Inquiry*, as Thomas Sophonow was convicted despite the fact that his alibi evidence was true and established his innocence. Education regarding the *Sophonow Inquiry* recommendations should be a part of Crown, defence and police training.

9) Jailhouse Informants

There should be education about jailhouse informants and other analogous types of witnesses generally. This education should focus on the circumstances in which jailhouse informants may be used, as well as the dangers, justifications and safeguards. Careful consideration by the police and Crown counsel should extend to unsavoury witnesses generally.

10) Ineffective Assistance of Defence Counsel

Providing qualified defence counsel is among the most important safeguards against wrongful convictions. Ongoing education on the causes of wrongful convictions should be available to all defence counsel.

11) Forensic Scientific Evidence – Junk Science – Proper Use of Expert Evidence

This is an area where all participants in the criminal justice process could benefit from additional education.

12) Benefits of DNA Evidence

Just as the use of DNA technology increases the chances of guilty parties being identified and held responsible for the crimes they commit, the use of DNA can also exonerate the innocent. The *DNA Identification Act* provides the opportunity to use DNA to solve criminal cases and identify the true offender while excluding innocent people. Crown counsel and police should be trained on the uses and benefits of DNA evidence, and of the need to make applications to obtain orders for its inclusion in the national DNA databank.

13) Disclosure

Disclosure has been identified as an important safeguard against wrongful convictions as it permits the accused to know the case against him/her and adequately prepare a defence. Ongoing education regarding police and Crown disclosure obligations should be a prominent part of educational training.

14) Charge Screening

The community relies on Crown counsel to vigorously pursue provable charges while protecting individuals from the serious repercussions of a criminal charge where there is no reasonable prospect of conviction. Crown counsel should receive training on charge-screening protocols and the limitations of reliance on public interest factors where no reasonable prospect of conviction exists. The importance of this limitation is highlighted in particularly heinous or notorious crimes where public passions are inflamed.

15) Conceding Appeals / Fresh Evidence

There should be education for police and prosecutors on the importance of careful review at the appellate stage, including the consideration of fresh evidence.

VII. SUMMARY OF RECOMMENDATIONS

1. **A National Forum on the Prevention of Wrongful Convictions, co-sponsored by the Heads of Prosecutions Committee and the Canadian Association of Chiefs of Police, should be held to provide national leadership and direction.***

2. **The following options for educational venues should be considered :**

   a) **joint educational sessions involving Crowns, police, defence and forensic scientists;**
   b) **specialized conferences, courses and educational materials for police;**
   c) **specialized conferences for Crowns, as well as segments in continuing education programs;**
   d) **judicial information sessions;**
   e) **law school courses;**
   f) **bar admission course; and**
   g) **education opportunities for the defence bar.**

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* Subsequent to the writing of this report, the Manitoba government, in conjunction with the University of Manitoba, has begun to plan an international conference on wrongful convictions in Winnipeg in October 2005. A representative of the Working Group is on the organizing committee and the Working Group believes this conference can achieve the same objectives as the proposed National Forum and wholeheartedly supports the initiative.

3. The following educational techniques should be considered:

- **a) presentation of case studies of wrongful convictions and lessons learned;**
- **b) small group discussions and role-playing, demonstrations of witness interviews, and conducting photo-lineups;**
- **c) on-line training for Crowns and police;**
- **d) distribution of educational materials/policies on CD-ROM;**
- **e) video-linked conferences;**
- **f) participation of psychologists, law professors and criminologists in educational conferences;**
- **g) guest speakers, including the wrongfully convicted; and**
- **h) regular newsletters on miscarriage of justice issues.**

4. The following educational topics should be considered:

- **a) role of the Crown and Attorney General;**
- **b) role of the police;**
- **c) tunnel vision;**
- **d) post-offence conduct and demeanour evidence;**
- **e) frailties of eyewitness identification;**
- **f) false confessions;**
- **g) witness interviews;**
- **h) alibi evidence;**
- **i) jailhouse informants;**
- **j) ineffective assistance of defence counsel;**
- **k) forensic scientific evidence and the proper use of expert evidence;**
- **l) benefits of DNA evidence;**
- **m) disclosure;**
- **n) charge screening;**
- **o) conceding appeals / fresh evidence.**

5. Each prosecution service should develop a comprehensive written plan for educating its Crown attorneys on the causes and prevention of wrongful convictions.

6. Any educational plan for the prevention of miscarriages of justice should include a public communication strategy to advise the public that participants in the criminal justice system are willing to take action to prevent future wrongful convictions.

CHAPTER 11 - OTHER ISSUES

The Working Group has identified several other issues related to wrongful convictions that are deserving of study:

1. Disclosure

Several cases of wrongful conviction, especially historic ones, have involved the failure of Crown counsel to disclose evidence to the defence.

However, since another Heads of Prosecutions Committee working group has already produced a report on this subject, and the federal government has indicated an intention to possibly legislate in this area, we will not discuss this issue further.

2. Ineffective Assistance of Counsel

In the United States, ineffective defence lawyers have certainly contributed to some cases of wrongful conviction.[223] It is not clear what the situation is in Canada, although none of the commissions of inquiry have highlighted this as an issue.

However, an issue that deserves some attention is what are the responsibilities of Crown counsel when they suspect an accused person may not be getting effective counsel. Perhaps some guidelines should be developed to assist prosecutors in these difficult ethical situations.

3. Police Notebooks/Crown Files/Trial Exhibits

As the *Morin* and *Sophonow Inquiries* noted, there are no consistent rules on how police take and keep their notes, how long police officers' notebooks should be kept, and who should keep them and where. The issue is complicated because police officers understandably record their notes chronologically, not necessarily by the case they are working on. For example, the *Sophonow Inquiry* noted:

> At the present time, officers, upon retiring or leaving the force, are required to keep their notebooks. This is unsatisfactory. At the Inquiry, evidence was given by conscientious officers that notebooks, which they kept in their homes after retirement, had been lost or irreparably damaged by fire or flood. This should not happen. The Municipality should be responsible for saving officers' notebooks. They should be kept preferably for 25 years, or at least 20 years, from the date that the officer leaves the force or retires. There are changes that occur in forensic science; witnesses emerge; or new physical evidence is discovered; and any of these elements may make a reinvestigation necessary. In those

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[223] See eg. Scheck, *Actual Innocence*, ch. 9.

> circumstances, the original notes would be of great importance. I realize that storage is a problem. However, the notebooks might be preserved by way of microfiche. In any event, storage should not become an insurmountable problem for the Police Service or the Municipality. The notes must be kept on file for the requisite time.

There is a similar lack of consistent rules for the maintenance of Crown files, trial exhibits and evidence gathered but not used. Federal officials report this has made the later investigation of allegations of wrongful convictions difficult.

Clear policies should therefore be developed for police, Crowns and court services on how long to keep police notebooks, Crown files and trial exhibits. Clearly the cost implications and rapid changes in technology will have to be considered in developing such policies.

CHAPTER 12 - CONCLUSION

If there is one theme that emerges from all of the recommendations in this report, it is vigilance – everyone involved in the criminal justice system must be constantly on guard against the factors that can contribute to miscarriages of justice and must be provided with appropriate resources and training to reduce the risk of wrongful convictions. Indeed, the Working Group believes that individual police officers and prosecutors, individual police forces and prosecution services, and indeed the entire police and prosecution communities, must make the prevention of wrongful convictions a constant priority.

To assist in this process, police officers and prosecutors, police and prosecution services need up-to-date and easy-to-access information. Therefore, the Working Group recommends that the FPT Heads of Prosecutions Committee, perhaps in association with the Canadian Association of Chiefs of Police, establish a resource center on the prevention of wrongful convictions. This would house the latest information, policies, research, studies and reports from Canada and elsewhere, on wrongful convictions, their causes and cures. This center need not even be a physical office but could be a Web site, or perhaps a page on the revamped FPT Heads Intranet site. The Working Group has already compiled an extensive library of material that can be used to build this resource. It could highlight the valuable work already being done in many jurisdictions and allow others to share these best practices and model their new policies on these existing ones.

Some of our recommendations will require changes by individual prosecutors and police officers. Some will require action by individual prosecution services and police agencies, others by the entire police and prosecution communities, sometimes working together. Some of our recommendations will take time to implement and some of our suggestions require the development of new policies. For example, detailed educational programs for police and prosecutors will need to be developed. Although some of these policies and educational opportunities can, and should, be developed locally, others would benefit from being developed centrally and then adapted to local conditions. To provide this follow-up and central coordination and development, as well as continuing leadership in ensuring the issue remains on the agenda of police and prosecutors, we recommend the HOP Committee establish a permanent committee on the prevention of wrongful convictions to continue our work. The current members of the Working Group could form the nucleus of such a committee. Again, such a committee would benefit greatly from the continued involvement of the police community through CACP.

Both the law and technology in many of the areas discussed in this report continue to evolve. As noted earlier, two more commissions of inquiry on wrongful convictions will issue their reports in the next few years. Therefore we recommend that the new committee continually review the recommendations in this report to take into account developments in the law and technology and subsequent commissions of inquiry. At a minimum, a full review should take place in five years, building on the ongoing work of this committee.

Many of our recommendations require nothing more than a change in attitude on the part of players in the criminal justice system. Others require changes in policy and practice by police and prosecutors. And of course some will require additional resources. But, given the potential impact on individuals who are wrongfully convicted, the untold costs from the loss of public confidence in the administration of justice and the millions of dollars spent on commissions of inquiry and compensation, the Working Group strongly believes this is money well worth spending.

SUMMARY OF RECOMMENDATIONS

1. **Subject to available resources, the FPT Heads of Prosecutions Committee, perhaps in association with the Canadian Association of Chiefs of Police, should establish a resource center on the prevention of wrongful convictions. This could be a Web page or a page on the revamped FPT Heads Intranet site.**

2. **The FPT Heads should establish a permanent committee on the prevention of wrongful convictions, with continued involvement of the police community through CACP.**

3. **The recommendations in this report should be continually reviewed by the committee to take into account developments in the law and technology and subsequent commissions of inquiry. At a minimum, a full review should take place in five years building on the ongoing work of this committee.**